

2007

National Parks Conservation Association v. The Board of Trustees of the School and Institutional Trust : Brief of Petitioner

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

NATIONAL PARKS CONSERVATION)
ASSOCIATION and WILLIAM WOLVERTON,)

PETITIONERS)

vs.)

THE BOARD OF TRUSTEES OF THE)
SCHOOL AND INSTITUTIONAL TRUST)
INSTITUTIONAL TRUST LANDS)
ADMINISTRATION, STATE OF UTAH,)
and GARFIELD COUNTY, STATE OF UTAH)
GARFIELD COUNTY, STATE OF UTAH,)

RESPONDENTS)

CASE NO. 20070835-SC

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FILED
UTAH APPELLATE COURT

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1. Order from Which This Appeal is Taken, Record document Number 31, R. 516-539:

Order of Board of Trustees of School and Institutional Trust Lands Administration, State of Utah: (1) Separating Adjudicative Proceedings; (2) Granting State's Motion to Dismiss Appeal of Agency Action Re: Exchange No. 188; and (3) Continuing Consideration of Request for Rulemaking.

Dated September 13, 2007.

2. Preliminary Statement on Behalf of the National parks Conservation Association and William Wolverton Regarding Issues of Fact and Law to be Determined in the Above Matter, dated December 12, 2006.

JURISDICTION OF THE SUPREME COURT

This case presents a Petition for Review of final agency action taken by the Board of Trustees [“SITLA Board”] of the State Institutional and Trust Lands Administration [“SITLA”] on review of an administrative appeal filed by the National Parks Conservation Association (NPCA)¹ and NPCA member William Wolverton.² Jurisdiction for this appeal is granted by U.C.A. 1953, § 63-46b-16, implementing the jurisdiction for judicial review of final action by the SITLA Board of Trustees also vested by U.C.A. 1953, § 53C-1-304.3.

This Court’s order dated November 5, 2007 determined that this matter should be retained in the Supreme Court.

ISSUES PRESENTED FOR REVIEW; STANDARD OF REVIEW; CITATION TO RECORD

I. Standard of Review Applicable to all Issues Listed Below:

Whether the “person seeking judicial review has been substantially prejudiced” by the agency’s decision, Utah Code Ann. § 63-46b-16(4), in the sense that “the alleged error was not harmless.” Utah Chapter of the Sierra Club v. Utah Air Quality Board, 2006 UT 74, ¶15, 148 P.3d 960, 967.

¹ Subsequent to this Court’s decision in National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909 (1993) (“NPCA-I”), NPCA struck the word “and” from its name, and is now known as the “National Parks Conservation Association.” It is undisputed that NPCA remains the same organization.

² Use of the term “NPCA” hereafter includes Wolverton unless the context indicates consideration of his individual interests or actions.

II. Standing Issues:

A. Whether NPCA, a nonprofit conservation organization devoted to protection of national park lands and their natural, scenic, aesthetic and recreational values, and an individual member of NPCA residing in Garfield County, had standing before SITLA, and the SITLA Board on administrative appeal, to assert and obtain consideration of the following claims and issues contesting agency approval of a new appraisal for exchange of school trust lands within Capitol Reef National Park in return for lands proffered by Garfield County (“Exchange 188”) following this Court’s recognition of NPCA’s “limited right of intervention” and remand order in National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909, 922 (n. 11), 924 (1993) (“NPCA-I”)

B. In dismissing NPCA’s administrative appeal on the ground that a “third party” could not participate in “executive real property decisions” and did “not have standing to attack SITLA’s substantive internal decision making,” whether the SITLA Board erred in denying standing on the basis of this Court’s intervention analysis in NPCA-I, 869 P. 2d at 914, 922 (n. 11), where NPCA’s current claims did not seek direct participation in the proceedings, were presented only after SITLA’s consideration of the appraisal, and sought only post-decision consideration of factual errors in the appraisal analysis and of legal issues affecting validity of the exchange transaction.

1. Standard of Review:

(a) Standing in administrative adjudications is to be determined as a “general question of law” subject to a correctness standard of review. Utah Chapter of the Sierra Club v. Utah Air Quality Board, 2006 UT 74, ¶12, 148 P.3d 960, 966; and whether the agency “erroneously interpreted or applied the law.” Utah Administrative Procedures Act, U.C.A. 1953, § 63-46b-16(4)(d).

(b) Whether the agency “engaged in an unlawful procedure or decision-making process.” U.C.A. § 63-46b-16(4)(e).

2. Record Preserving the Issues

(a) NPCA’s initial “Appeal from Final Agency Action By The SITLA Director Dated 15 September 2006 In Re Exchange 188” at 3-5, Record (“R”) 30.

(b) NPCA’s “Preliminary Statement on Behalf of the National Parks Conservation Association and William Wolverton Regarding Issues of Fact and Law To Be Determined In The Above Matter” at 2-3, 6.

(Omitted from Record; attached in the Addendum)

(c) NPCA’s “Opposition To State of Utah’s Motion To Dismiss Appeal of Agency Action In Re Exchange 188 and Request for Rulemaking” at 28-29, R. 263-64.

(d) NPCA's "Appellant's Response To Proposed Order" at 2-4, 6-8, 9, R. 447-49, 451-53, 454.

III. Standards of Administrative Decision

Whether the SITLA Board failed to comply with applicable standards of decision in dismissing, for lack of standing, NPCA's administrative appeal from SITLA's approval of a new appraisal of values for Exchange 188, where NPCA's claims of remediable injury and its substantive claims of unlawful action and abuse of discretion both rested on statements of record by the appraiser, and factual allegations and public records proffered by NPCA, which demonstrated material omissions and disregard of material information and analyses in a new appraisal relied on by SITLA to satisfy the remand in NPCA-I.

1. Standard of Review:

(a) Whether the agency decision, on a motion to dismiss or for summary judgment construed the pleadings in the light most favorable to the appellants, indulged all reasonable inferences in their favor, considered only facts not in dispute, and ruled for the movant only if it appeared as a matter of law that appellants could not prevail." U.C.A. 1953 § 63-46b-1 (adopting Rules 12(b) and 56, U.R.C.P. for administrative adjudications); Harvey v. Sanders, 534 P.2d 905 (Utah 1975)(standards for dismissal/summary judgment); Sorenson v. Beers, 585 P.2d 458, at 460 (Utah 1978)(standards for dismissal).

(b) Utah Administrative Procedures Act, U.C.A. 1953, § 63-46b-16(4)(c) (“agency has not decided all issues requiring resolution”); § 63-46b-16(4)(d) (agency “erroneously interpreted or applied the law”) and § 63-46b-16(4)(e) (agency “engaged in an unlawful procedure or decision-making process”).

2. Record Preserving The Issue

(a) NPCA’s “Opposition To State of Utah’s Motion To Dismiss Appeal of Agency Action In Re Exchange 188 and Request for Rulemaking” at 2, 15 [para. (c)], 20 [paras. (c) and (d)], 21 [para. (f)], 22-23, 29, R. 237, 250, 255, 256, 257-58, 264.

(b) Appellant’s Response To Proposed Order” at 4-5, 6-8, 9-10, 14-15, R. 449-50, 451-53, 454-55.

IV. Issues On The Merits

A. Where the new appraisal approved by SITLA in support of Exchange 188 based its valuation of the national park land on hypothetical calculations that assumed full development of all 640 acres in 40-acre parcels, whether it was unlawful, arbitrary and capricious or an abuse of discretion, on administrative appeal, for SITLA and the SITLA Board, without substantive explanation, to disregard and refuse to consider:

(1) statements of record by the appraiser, and factual allegations and public records proffered by NPCA, demonstrating the geographic, economic and regulatory infeasibility of the development scenario assumed by the appraisal; and

(2) the resulting failure of the appraisal to comply with the Uniform Standards of Professional Appraisal Practice; and

(3) obtaining a new or revised appraisal; and

(4) initiating proceedings for possible alternative dispositions based on revised values that may result from a new appraisal.

B. Whether it was unlawful, arbitrary and capricious, or an abuse of discretion for SITLA and the SITLA Board of Trustees to rely, as the basis for valuation of the lands to be exchanged in Exchange 188 under this Court's remand order, on an appraisal described by the appraiser as a "Limited Restricted Use Report" which:

(1) the appraiser acknowledged "presents no discussions of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion of value," and under "prior agreement with the client" offered only "a limited appraisal process in that certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practice were invoked," resulting in his "warning" that "the reliability of the value conclusion may be impacted . . ." ; and,

(2) a second reviewing appraiser described as "specific to the needs of the client," did "not contain sufficient information for an unrelated third party to fully

understand the report” and therefore “cannot be relied upon by anyone other than the client.”

C. Where the new appraisal approved by SITLA on remand from NPCA-I concluded that the value of land proffered to SITLA by Garfield County constitutes 330.5% of the value of land to be received by the County in exchange,

(a) whether completion of Exchange 188 on the basis of those values would constitute an unlawful disposition of County land in violation of the requirement under this Court’s precedents that the County receive full and fair consideration for disposition of its property; and

(b) whether the terms of this Court’s remand in NPCA-I barred SITLA from considering or taking any action to address or avert an unlawful disposition; and

(c) whether failure and refusal of SITLA or the SITLA Board to reconsider or stay the effectiveness of its approval of the appraisal, or take any other action to avert or defer consummation of the land exchange on the basis of those disparate values, was unlawful, arbitrary and capricious or an abuse of discretion.

D. Whether, on the basis of its prior claims litigated in NPCA-I, *supra*, NPCA is barred by the doctrine of res judicata, and the collateral estoppel branch of that doctrine, from administrative or judicial challenge to the lawfulness of the excessive consideration

that would be conferred by Garfield County if Exchange 188 is consummated on the basis of the values disclosed by the new appraisal obtained by SITLA on remand.

(A) Standards of Review:

Utah Administrative Procedures Act, U.C.A. 1953, § 63-46b-16(4)(c) (“agency has not decided all of the issues requiring resolution”); § 63-46b-16(4)(d) (“agency has erroneously interpreted or applied the law”); § 63-46b-16(4)(g) (agency determination of fact regarding property value “not supported by substantial evidence” on the whole record); § 63-46b-16(4)(h)(I) and (iv) (agency action an abuse of discretion, or arbitrary and capricious in failing to address or offer rational reasons for disposition of material issues)

(B) Record Preserving The Issue

(1) NPCA’s “Opposition To State of Utah’s Motion To Dismiss Appeal Of Agency Action In Re. Exchange 188," at 3, 4, 5, 6-10, 13-15, 16-21, 27-28, 29-30, R.238-245, 248-250, 251-56, 262-63, 264-65..

(2) NPCA’s “Appellant’s Response To Proposed Order” at 2, 5-9, 10-12, 14, R. 447, 450-54, 455-57, 459.

(3) NPCA’s initial “Appeal from Final Agency Action By The SITLA Director Dated 15 September 2006 In Re Exchange 188" at 1, 5-6, 9-10, R. 28, 32-33, 36-37.

(4) NPCA’s “Preliminary Statement on Behalf of the National Parks Conservation Association and William Wolverton Regarding Issues of Fact and Law To

Be Determined In The Above Matter” at 3, 6, 7. (Omitted from Record; attached in the Addendum.)

V. Remedial Issues

Where statements of record by the appraiser, and factual allegations and public records proffered by NPCA on administrative appeal raised material questions of fact and law about the adequacy of the new appraisal approved by SITLA for Exchange 188 and the disparity of values it reported, whether it was arbitrary, capricious, an abuse of discretion, or otherwise unlawful for SITLA and the SITLA Board to refuse to consider:

- (a) initiating and obtaining a new and valid appraisal; and
- (b) initiating consideration of an alternative disposition of the national park lands, at full and fair value, to an entity committed to protection of the natural, scenic, aesthetic and recreational values of that property in the manner suggested by this Court’s statement in NPCA-I that “it would be unconscionable not to preserve and protect those values” and that the state “may have to consider” transactions that can facilitate protection while also ensuring return of “full economic value” to the school trust. 869 P.2d at 921.

1. Standards of Review

U.C.A. 1953, § 53C-1-304(4)(b). and § 63-46b-12 (Board decision to be based on findings, conclusions and reasons); § 63-46b-16(4)(h)(I) and (iv) (agency action an abuse of discretion, arbitrary and capricious in failing to address or offer rational reasons for disposition of material issues.)

2. Record Preserving The Issue

(a) NPCA's initial "Appeal from Final Agency Action By The SITLA Director Dated 15 September 2006 In Re Exchange 188" at 1-2, 9-10, R. 28-29, 36-37.

(b) NPCA's "Preliminary Statement on Behalf of the National Parks Conservation Association and William Wolverton Regarding Issues of Fact and Law To Be Determined In The Above Matter" at 2, 5, 6, 9-10, 11. (Omitted from Record; attached in the Addendum.)

(c) NPCA's "Opposition To State of Utah's Motion To Dismiss Appeal Of Agency Action In Re. Exchange 188," at 11-12, 16, 19-23, 30, R. 246-47, 251, 254-58, 265.

(d) NPCA's "Appellant's Response To Proposed Order" at 14-15, R. 459-60.

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE**

Petitioners submit the following as determinative or of central importance:

1. Uniform Standards of Professional Appraisal Practice, Standard Rule 1-2 (The Appraisal Foundation, 2006)³

In developing a real property appraisal, an appraiser must:

(e) identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, including (I) its location and physical, legal and economic attributes; [and] (iv) any

³ Available on Appraisal Foundation web site at:
http://www.appraisalfoundation.org/s_appraisal/sec.asp?CID=3&DID=,3, at the following link:
<http://commerce.appraisalfoundation.org/html/2006%20USPAP/std1.htm>.

known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature; and

(f) identify an extraordinary assumptions necessary to the assignment [which must have “a reasonable basis” and must be disclosed].

2. U.C.A. § 63-46b-1(4):

This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from: . . .

(B) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

3. Utah Rules of Civil Procedure, Rule 12(b):

How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves a Petition for Review appealing an order by the Board of Trustees (“SITLA Board”) of the State Institutional and Trust Lands Administration (“SITLA”) that dismissed an NPCA administrative appeal. The appeal challenged SITLA approval of a new (2005) appraisal obtained to support exchange of a section of school trust land within⁴ Capitol Reef National Park (“Park Section 16”) for land proffered by

⁴ Legal description in NPCA-I, 869 P.2d at 911; and in the minutes of SITLA’s final

Garfield County (“Exchange 188”), previously at issue in National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909 (1993) (“NPCA-I”).

That decision invalidated a prior appraisal arranged by the County and relied on by the Division of State Lands as the valuation basis for Exchange 188. The Court remanded to the Division, ordered an independent appraisal, and stayed further action on the exchange pending compliance, as follows:

We remand this case to the Division for a determination of whether the appraised values of section 16 and the Garfield County lands offered in exchange represent the full value of those lands.

The stay presently in effect will continue until the Division makes the requisite determinations that the value of the land exchanged for section 16 is adequate under its trust obligations.

869 P.2d at 923.

This Petition seeks review of the SITLA Board’s order dated September 13, 2007, dismissing NPCA’s administrative appeal that asserted various challenges to SITLA’s approval of a new appraisal in support of Exchange 188 following the above remand. The order dismissed certain claims on the merits and denied NPCA’s standing to assert other claims.

agency action at issue in this appeal described as “Section 16, Township 34 South, Range 8 East, SLB & M.” See “Exchange 188 (value and records update on remand from the Utah Supreme Court),” Exhibit H, SITLA Motion To Dismiss, R 187, 189.

B. COURSE OF THE PROCEEDINGS

Following the 1993 remand in NPCA-I and a follow-up NPCA request for notice and opportunity to intervene in the remanded appraisal proceedings, no action was taken until a new appraisal was arranged by SITLA in 2005, submitted by the appraiser on August 25, 2005. Following receipt of the appraisal in Spring 2006, NPCA's counsel submitted objections to SITLA challenging the adequacy and reliability of the appraisal, as well as the lawfulness of the consideration to be received by Garfield County. When SITLA rejected NPCA's objections and approved the appraisal as satisfying the remand order in NPCA-I, an administrative appeal was filed by NPCA with the SITLA Board. After preliminary submissions regarding disputed issues of fact and law, SITLA submitted a Motion to Dismiss for Failure to State Cause of Action, R. 90. ("Motion to Dismiss.") Without further fact proceedings, following further briefing and oral arguments, the SITLA Board on September 13, 2007, entered an Order: (1) Separating Adjudicative Proceedings; (2) Granting State's Motion to Dismiss Appeal of Agency Action in Re Exchange No. 188; and (3) Continuing Consideration of Request for Rulemaking. R. 516 ("Order"). That Order also separated and continued proceedings in a previously consolidated appeal from denial of a related NPCA Rulemaking petition.

C. DISPOSITION BELOW

All claims asserted by NPCA's administrative appeal from SITLA's approval of the new McConkie appraisal were dismissed by final Order of the SITLA Board. Certain

claims were dismissed on the merits while other claims were dismissed on the ground that SITLA lacked standing to assert the claim. The Order also separated NPCA's appeal from denial of its Petition for Rulemaking, continuing its consideration to a later date. NPCA has not contested continuance of its Rulemaking appeal; but it expressly reserved its claims regarding the pertinence of the proposed Rulemaking remedies to its appraisal appeal.

D. STATEMENT OF FACTS

1. NPCA Request for Notice of Appraisal Proceedings Following NPCA-I.

On July 1, 1993, shortly after the decision in NPCA-I, counsel for NPCA submitted to the Division of State Lands a "Notice of Intervention by National Parks and Conservation Association in All Proceedings Relating to Land Appraisal and determination of adequacy of Value to The School Trust in Land Exchange Proposed by Garfield County for County acquisition of Section 16 [etc.]." The Notice asserted NPCA's "right of intervention in the Garfield County land exchange proceedings on the issue concerning the Division's duties with regard to an appraisal. . . ." and requested notice of all actions initiated to comply with the Court's remand, as well as access to copies of all related correspondence and documents. Appellants' Response to Proposed Order at 3-4, and attached Exhibit A, R. 448-49, 463. SITLA made no response to that notice and request, and NPCA received no notice of a new appraisal until after it was completed and pending before SITLA. Transcript of Hearing Proceedings, September 13, 2007, p.

27-28, R. 504-05. NPCA has not sought active participation in the current appraisal proceedings, which occurred without notice to NPCA. But NPCA has claimed a limited right to SITLA consideration of its objections to the adequacy and reliability of the new appraisal at issue in this matter, and to the unlawfulness of consideration for the land exchange disclosed by that appraisal.

2. New Appraisal, NPCA Objections and SITLA Approval.

On August 25, 2005, an appraisal opinion was submitted to SITLA by Stanford S. McConkie, of Morley & McConkie, L.C. “Limited Restricted Use Report: Appraisal of Three Parcels of Land Located in Garfield County and Two Industrial Lots Located in Richfield Sevier County, Utah,” (“McConkie Appraisal”), Exhibit B, Motion to Dismiss, R. 132. The McConkie Appraisal valued the trust land in Capitol Reef National Park, Park Section 16, at \$200,000, while it valued the lands to be exchanged therefor by Garfield County at \$661,200, R.155. Informal notice of that appraisal was provided to NPCA in late 2005; but no copy was provided until May or June 2006. (Date not determined on the record; but, on information and belief, the exact date is not disputed or material.)

On August 29, 2006, NPCA’s counsel submitted a letter to SITLA raising the objections to the accuracy, adequacy and reliability of the McConkie Appraisal that were subsequently presented by NPCA’s administrative appeal. The letter emphasized that the appraisal “significantly overstates the proper fair value of the school section.” Even at the

appraised values, the letter asserted, SITLA will receive “excessive return exceeding fair value” which “is inappropriate where the transaction will have the effect of defeating the protective strategies endorsed by the Supreme Court in [NPCA-I].” The letter contended that a proper appraisal would reflect a lower value for Park Section 16, thereby presenting “opportunity for a range of options . . . for disposition of the property that will at once return fair value and ensure protection.” Exhibit C, SITLA Motion to Dismiss, R. 162.

NPCA counsel’s letter also submitted an “Appraisal Review” by Appraisers J. Philip Cook and Virginia H. Hylton that had been prepared for another entity (Southern Utah Wilderness Alliance). While expressing no approval or endorsement of an alternative valuation methodology favored by the reviewers, NPCA’s letter highlighted the Appraisal Review description of specific and admitted “Limited Restricted Use” limitations also acknowledged by the McConkie appraisal. The Appraisal Review emphasized that the “Restricted Use Appraisal Report” (The McConkie Appraisal) --

- * presents “no discussions of the data, reasoning, and analysis that were used in the appraisal process”;

- * withheld “[s]upporting documentation concerning the data, reasoning and analysis” which were “retained in the appraiser’s files”;

- * invoked “certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practice.”

In short, NPCA emphasized that the appraisal review found limited disclosure of appraisal data and analyses, and that McConkie admitted lack of “sufficient information for an unrelated third party to fully understand the report.” Indeed, McConkie had even warned, in the appraisal document, that “the reliability of the value conclusion provided may be impacted.” NPCA’s letter for concluded:

While such an appraisal may serve undisclosed purposes of a client, it cannot be sufficient where important public interests are likely to be significantly adversely affected by the appraisal . . . [N]either NPCA nor other members of the public have any way of assessing the reliability, accuracy or possible motivations for the deviations from full disclosure and standard practices acknowledged [in the McConkie appraisal]. Nor is it possible to be sure that the appraisal avoided the “sharp practices” or other irrelevancies of concern to the Supreme court in this matter, or that the appraisal actually represented “fair value.”

Letter, Wayne G. Petty to Kevin Carter, August 29, 2006, Exhibit C, Motion to Dismiss, R. 162, discussing “Appraisal Review (A Portion) Of Moreley & McConkie, L.C., Sanford S. McConkie, MAI Appraisal Dated August 25, 2005” by appraisers J. Philip Cook and Virginia H. Hylton (July 25, 2006), Motion to Dismiss Exhibit D, R. 169.

On September 15, 2006, the Director of SITLA took final agency action accepting and approving the McConkie Appraisal. Based on the reported valuations, he determined that the “value ratio” of 330.5% (\$661,000/\$200,000) reflected in that appraisal “remains acceptable, for purposes of compliance with the Utah Supreme Court’s order in the NPCA case.” Minutes, final agency action of SITLA Director Kevin S. Carter, September 15, 2006, Exhibit H, Motion to Dismiss, R 187-190.

3. Administrative Appeal from SITLA Approval of the McConkie Appraisal as Satisfying the Remand order in NPCA-I, and Subsequent Proceedings

On September 29, 2006, NPCA and an individual NPCA member William Wolverton filed with the SITLA Board an administrative appeal from the SITLA Director's decision approving the McConkie appraisal as the basis for consummation of Exchange 188. Appeal From Final Agency Action by The SITLA Director dated 15 September 2006 In Re Exchange 188, R. 28. The appeal contended that the McConkie appraisal was inadequate and unreliable on several grounds:

a. Failure of the Appraisal Methodology to Consider Material Topographic, Economic and Regulatory Factors Pertinent to Valuation:

NPCA's appeal challenged the adequacy of the appraisal because it failed to consider significant development constraints resulting from topography, national park regulatory restrictions and unavailability of water and power service. The appeal contended these constraints would render infeasible the kind of development relied on by the appraisal as the basis for its value calculations. These calculations assumed that all 640 acres of Park Section 16 could be sold in 40-acre parcels at a uniform price, for a total valuation of \$200,000. Exhibit B at 13, Motion to Dismiss, R. 153. Relying on maps available in SITLA's files, on National Park Service documents, adjudicated cases, and the appraiser's own significant admissions recited in the appraisal report, NPCA offered to show and argued that:

- (i) the appraisal failed to consider that substantial portions of Park Section 16 involved very steep topography not subject to development;
- (ii) any development on the property would be subject to severe regulatory constraints under statutes, regulations and implementing case law protecting national parks, and specifically applicable to the land in question; and
- (iii) the property lacked any utility services or water access, and faced similar regulatory constraints in obtaining those services.

The appeal emphasized that even the McConkie Appraisal had contradicted the basis for its valuation calculations by acknowledging that Park Section 16 “has limited utility, if any,” because “[t]his parcel consists of land that is very irregular in terrain, with steep sandstone cliffs and rocky terrain as well as some limited open space.” McConkie appraisal at 3 (Parcel No. 3), Exhibit B. Motion to Dismiss, R. 143. None of these constraints were reflected or considered in the Appraisal’s recited basis for valuation.

These failures, NPCA contended, rendered the McConkie appraisal inadequate to provide the reliable basis for valuation required by the Court in NPCA-I. Appeal From Final Agency Action by The SITLA Director Dated 15 September 1006 In Re Exchange 188, at 7-9, R. 34-36.

b. Fact Issues Framed to Address Development Constraints and Natural Values on Park Section 16

The development constraints and natural values of Park Section 16 were further asserted in NPCA's preliminary identification of material fact issues to be determined in the administrative appeal, including:

- * the steepness of the terrain within Section 16 and the extent of land and building sites with slopes at low enough gradient to permit feasible and lawful access and construction;

- * whether the McConkie appraisal, or SITLA in approving it, actually determined that despite the steep terrain, all of the 640 acres of Section 16 were feasible for development and susceptible for sale in 40-acre lots as recited in the appraisal;

- * whether McConkie in preparing the appraisal, or SITLA in approving it, made any determination regarding the effect on land values resulting from the steepness of the terrain or the absence of water and utilities;

- * whether McConkie in preparing the appraisal, or SITLA in approving it, made any inquiries, investigations or determinations regarding applicable regulatory restrictions governing construction on and use of the land within Section 16 arising from National Park Service authority for protection of Capitol Reef National Park, or the effect of any such restrictions on land values. Preliminary Statement on Behalf of the National Parks Conservation Association and William Wolverton Regarding Issues of Fact and Law to be Determined in the Above Matter, at 5. (Omitted from Record; attached in Addendum.)

NPCA also submitted extensive references to official documents demonstrating the unique and important natural values of Park Section 16 and the substantial regulatory constraints limiting any development on the section. These included U.S. National Park Service management plan documents, and the analysis of regulatory authority and order entered by the U.S. District Court for the District of Utah in United States and National Parks and Conservation Association v. Garfield County and State of Utah, 122 F.Supp.2d 1201 (2000). See “Appellants’ Supplemental Statement of Facts” and Annexes in NPCA’s “Opposition to State of Utah’s Motion to Dismiss Appeal of Agency Action In Re: Exchange 188 And Request for Rulemaking,” at 6-10, R. 241-245.

- c. Failure of the McConkie “Limited Restricted Use Report” to Disclose or Explain Underlying Data, Analyses and Assumptions, and Restrictions on the Scope of the Appraisal as Agreed Between McConkie and SITLA

NPCA’s appeal also contended that the appraisal provided an unreliable basis for valuation because it was a “Limited Restricted Use Report” which even the appraiser acknowledged “presents no discussions of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser’s opinion of value.” The appraiser also acknowledged that, under “prior agreement with the client,” the appraisal utilized only “a limited appraisal process in that certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practice were invoked.” The “allowable departures” from appraisal standards were not identified; but the appraisal warned “that

the reliability of the value conclusion may be impacted” McConkie Appraisal at 1-2, Exhibit B. Motion to Dismiss, R 141-42.

The unreliability of the “Limited Restricted Use Report” and its inadequacy to permit public review were also emphasized in an Appraisal Review by Appraisers J. Philip Cook and Virginia H. Hylton, submitted to SITLA by NPCA. They described this type of report as “specific to the needs of the client”, explaining that it does “not contain sufficient information for an unrelated third party to fully understand the report” and therefore “cannot be relied upon by anyone other than the client.” “Appraisal Review (A Portion) Of Moreley & McConkie, L.C., Sanford S. McConkie, MAI Appraisal Dated August 25, 2005” by appraisers J. Philip Cook and Virginia H. Hylton (July 25, 2006), at 2-3, Exhibit D, Motion to Dismiss, R. 170-171.

d. Disparity of Value of the Exchange Properties Raising Questions Regarding the Lawfulness of Consideration to be Received by Garfield County

NPCA also challenged the lawfulness of the land exchange if it were consummated on the basis of the values reported by the appraisal. Because the lands to be conveyed by Garfield County were admittedly appraised at 330.5% of the value of the Park land the County would receive, NPCA contended that the exchange would violate the requirement under this Court’s precedents that the County must receive full and fair consideration for disposition of its property. Recognizing doubt that SITLA or the SITLA Board had authority to directly void the transaction or invalidate the deeds previously exchanged in

December 1992, NPCA proposed a number of other steps within SITLA's authority that could be taken, such as suspending approval of the McConkie appraisal pending further steps to avoid an illegal transaction. Appellants Response to Proposed Order at 11, R. 456.

- e. Request for SITLA to Consider Feasible Steps for Protection of National Park Noneconomic Values on Park Section 16 Which Could Return Fair Value to the School Trust.

Finally, NPCA requested that SITLA take steps to obtain a new appraisal in lieu of the inadequate McConkie appraisal, and to consider an alternative disposition responsive to the Utah Supreme Court's concerns in NPCA-I regarding protection of unique noneconomic values on trust lands. Specifically, NPCA's appeal requested the SITLA Board to:

- (i) disapprove the McConkie appraisal;
 - (ii) defer further action on the appraisal and exchange pending SITLA and Board determinations regarding Board or judicial action to invalidate any conveyances effected on the basis of defective or unreliable appraisals; and
 - (iii) defer further action on the appraisal and exchange pending SITLA and Board consideration and determinations regarding feasible alternative processes for protection of trust lands having unique natural values, as urged by this Court in NPCA-I;
- and

(iv) initiate a new appraisal that adequately reflects the development limitations on Park Section 16; and,

(v) initiate consideration of a possible alternative negotiated transaction for a protective disposition of Park Section 16 in lieu of Exchange 188, on terms that would also assure fair value to the school trust. NPCA, Appeal from Final Agency Action at 2, R.29.

f. Grounds for Standing Asserted by Appellants NPCA and Wolverton

NPCA and Wolverton asserted extensive and undisputed allegations and submissions regarding multiple bases for their standing to litigate the above claims before SITLA and the SITLA Board, including:

(1) NPCA members' active and continuing use and enjoyment of Park Section 16 and the affected areas of Capitol Reef National Park, including use and protective advocacy by individual member and appellant, William Wolverton.

(2) Appellant William Wolverton's own personal interest as a Garfield County property taxpayer in avoiding unlawful disposition of County property without fair consideration;

(3) NPCA's extensive activity in litigation and related advocacy directed to protection of Capitol Reef National Park, and successful resistance to Garfield County efforts to pave the Burr Trail which transects Park Section 16 and affects the immediate area of the trust land in question, demonstrating: (I) NPCA's own active interest, as an

entity and conservation organization, in protection of Section 16; and (ii) the public importance of the current issues regarding protection of Section 16 that NPCA seeks to raise, as reflected in the substantiality of its involvement in prior extensive litigation and other action to protect Section 16 and adjacent areas;

(4) NPCA claimed injury arising from the inadequate and inaccurate appraisal, and unlawful consideration by Garfield County because: (I) approval of the McConkie appraisal may consummate the exchange transaction, making it likely that Section 16 will be subject to development actions by Garfield County likely to damage its natural values; and (ii) the inadequacies of the appraisal resulted in excessive valuation of the Section 16, which inhibits opportunity for individual conservation entities to negotiate a fair value price at which an alternative protective disposition of the property can be structured;

(5) The immediate probability of the injury to NPCA's above interests from Garfield County development activities is demonstrated by record submissions of communications from the National Park Service, including pictures showing County use of a bulldozer to clear a substantial area within Park Section 16 in April 2006, even before SITLA approval of the McConkie appraisal, while the stay entered in NPCA-I remained in effect. Appendix to Appeal From Final Agency Action by The SITLA Director Dated 15 September 2006 In Re Exchange 188, at 5, and Appendix, R 32, 38-43.

(6) NPCA's standing assertions also included claims for remedies that offer a substantial likelihood of redressing the above injuries, including (I) SITLA withdrawal or

suspension of its approval of the McConkie appraisal; (ii) SITLA arrangements for a proper and adequate appraisal to establish a fair value for Section 16 that reflects the substantial constraints on development disregarded by the McConkie appraisal; (iii) SITLA initiation of a process for considering and structuring a transaction for acquisition of Section 16, at fair value, by an entity committed to protection of the noneconomic values of Park Section 16. NPCA, Appeal From Final Agency Action at 2, R.29.

4. SITLA’S Dismissal of NPCA’s Claims and Standing

On September 13, 2007, the SITLA Board entered its final order dismissing all claims presented by NPCA’s administrative appeal from SITLA’s approval of the new McConkie appraisal. Certain claims were dismissed on the merits, while other claims were dismissed on the ground that SITLA lacked standing to assert the claim. The order also separated NPCA’s administrative appeal from denial of its Petition for Rulemaking, continuing that appeal to a later date.

a. Dismissed on the Merits: Claim of Inadequate Consideration to Garfield County

The SITLA Board’s dismissal Order admitted, as a matter of law, that “local governments may not dispose of real property without adequate compensation,” but nevertheless dismissed that claim on the merits. The Board held that determination of that issue was beyond the scope of the Court’s remand in NPCA-I; that the Board lacked authority to determine the illegality or to adjudicate the earlier conveyance; and that NPCA was barred by res judicata from raising issues bearing on the disparity of values in

the exchange. It gave no consideration to steps suggested by NPCA, or any other alternative steps, that SITLA or the SITLA Board could take to address the problem of unlawful insufficiency of consideration. Order: (1) Separating Adjudicative Proceedings; (2) Granting State’s Motion to Dismiss Appeal of Agency Action In Re Exchange No. 188; and (3) Continuing Consideration of Request for Rulemaking” at 11-13, R. 526-528.

b. Dismissed on the Merits: Claims Regarding the Legal Adequacy of The “Limited Restricted Use Report” Submitting the McConkie Appraisal

The SITLA Board held that the McConkie Limited Restricted Use Report was “sufficient to meet the Supreme Court’s mandate [in NPCA-I]. . . to determine independently . . . whether full compensation had been achieved by the school trust” and is appropriate under appraisal practice “[w]hen the intended users do not include parties other than the client” Order at 13-17, R. 528-532. The Order acknowledged that the Limited Restricted Use Report “departed in some respects from specific USPAP guidelines” which “could impact the reliability of the value conclusions,” But the Order did not review any of the acknowledged omissions of data or analysis. It did not address any exclusions from the report acknowledged to have been agreed between McConkie and SITLA. And it did not consider whether failure to disclose these factors affected the independence of the appraiser’s opinion, or the accuracy or reliability of the appraisal, or its validity as the basis for transactions affecting school trust properties. The Order

dismissed these concerns because “[t]he Supreme Court’s directive was for an independent review of valuation, which was accomplished.” Id.

c. Dismissed for Lack of NPCA Standing: All Claims of Inadequate Consideration of Topography and Regulatory Constraints

Holding that NPCA, as a “third party” had no right to intervene in the remanded appraisal matter, the Board interpreted NPCA-I as articulating “the sound policy for denying third party intervention into executive real property decisions.” On that basis, the SITLA Board’s Order dismissed, for lack of standing, all of NPCA claims and submissions asserting failure of the McConkie appraisal to address the topographical, economic and regulatory constraints identified in NPCA’s submissions. It concluded “The Board finds that, on remand, the Petitioners do not have standing to attack SITLA’s substantive internal decision making concerning the specific values of the lands committed to a state land exchange.” Order at 17, R. 532.

In so ruling, the Board Order did not address this Court’s express recognition of NPCA’s right of “limited intervention” to attack the appraisal supplied by the County in NPCA-I, 869 P.2d at 922, n. 11, erroneously asserting without qualification that the Court had “specifically denied NPCA the right to intervene in the exchange transaction.” Nor did the Board explain whether or how consideration of the concrete inadequacies asserted by NPCA would interfere with “executive real property decisions,” Order at 16, R 531, or why insulation from scrutiny of such material omissions was necessary to effective

executive judgment. Rather, it held that NPCA lacked standing to raise or present these concerns and should be denied “third party intervention into executive real property decisions.” Id.

Although the Board recognized that its standard of review required it to “construe the pleadings in the light most favorable to the Petitioners,” it gave no consideration or weight to NPCA’s submissions regarding the topographical, regulatory and economic constraints disregarded by the McConkie appraisal. Finding “contradiction” in NPCA’s assertions that the consideration to the County would be inadequate and that Park Section 16 was arguably overvalued, the Board decided that it “need not resolve these inconsistencies” because of NPCA’s lack of standing. Order at 16, R. 531. It thus did not consider NPCA’s further claim – not requiring intrusion into executive discretion– that a probable lower valuation of Park Section 16 might demonstrate a still more severely inadequate consideration to the County, potentially enhancing the feasibility of an alternative protective disposition as urged by NPCA.

- d. Dismissed on the Merits: NPCA’s claim that in considering remedies for the inadequate McConkie appraisal and unlawful consideration to Garfield County, the Board should consider alternatives that respond to this Court’s guidance in NPCA-I regarding the need to protect natural noneconomic values on unique trust lands.

The SITLA Board rejected any pertinence or applicability to this appeal of this Court’s emphasis on the above concerns in NPCA-I, explaining that the opinion had found those concerns satisfied by the Division of State Lands. Order at 17-18, R. 532-33. On

that ground, it declined any consideration of a remedy for the inadequacies of the McConkie Appraisal involving possible alternative protective dispositions with fair value to the school trust based on obtaining of a reliable new appraisal.

SUMMARY OF ARGUMENTS

NPCA contends that its Appeal From Final Agency Action . . . In Re Exchange 188, R. 28, states a claim because:

(1) The McConkie appraisal is inadequate on its face because it utterly failed to address material development constraints that would diminish valuation of Park Section 16, including extensive precipitous topography, severe regulatory restrictions and lack of water and electrical services. That failure also renders the appraisal inadequate under authoritative requirements of the Uniform Standards of Professional Appraisal Practice. Further the Mcconkie Appraisal is internally inconsistent, stating that Park Section 16 “has limited utility, if any” because “[t]his parcel consists of land that is very irregular in terrain, with steep sandstone cliffs and rocky terrain as well as some limited open space,” while concluding 16 40-acre parcels could be developed.

(2) The appraisal fails to meet this Court’s requirements for a “reliable appraisal” that ensure “ that trusts are properly administered” and fulfill “the overriding public interest in the proper administration of the school land trust,” 869 P.2d at 921-22, because, as a “Limited Restricted Use Report,” the McConkie Appraisal relied on undisclosed terms of agreement with SITLA and failed to disclose the basic data and

analyses on which it relied, causing even the appraiser to warn that “that the reliability of the value conclusion may be impacted”

(3) The appraisal’s conclusions, if correct, acknowledged that the lands conveyed by Garfield County were valued at 330.5% of the value attributed to the Park Section it would receive, constituting a clear violation of this Court’s precedents requiring counties to receive “adequate consideration” for disposition of their properties. Though without authority to invalidate deeds, SITLA had ample administrative power to initiate interim steps toward correction, including reconsideration and withdrawal of its approval of the appraisal and deferral of further action pending acquisition of a reliable appraisal, as well as initiating renegotiation of the transaction or commencing litigation challenge.

(4) Assertion of the claims regarding inadequate consideration were not barred by res judicata or collateral estoppel because the McConkie appraisal presented entirely new facts, and the issue was neither decided nor litigated in NPCA-I.

(5) SITLA should have sought a new appraisal providing a reliable valuation of Park Section 16, and thereafter should have initiated proceedings to consider the feasibility and possible structure of an alternative disposition, at fair value, to an entity committed to protecting the noneconomic “unique scenic, paleontological, and archeological values” of the Section in accordance with this Court’s guidance in NPCA-I.

ARGUMENT

In this matter, NPCA has challenged SITLA's erroneous approval of an inadequate appraisal on remand from NPCA-I, and seeks relief grounded in sound agency judgment and discretion responsive to this Court's guidance urging that to protected "unique scenic, paleontological, and archeological values" which "it would be unconscionable not to preserve and protect . . . the state may have to consider exchanging public trust lands or other state lands for school lands." NPCA-I, 869 P.2d at 920-21.

NPCA asserted the arguments below in support of its administrative appeal seeking SITLA's consideration of an alternative to the disposition of Park Section 16 effected by Exchange 188, emphasizing the inadequacy and unreliability of the McConkie appraisal, and the unlawful lack of consideration for disposition of Garfield County land that it disclosed.

I. THE McCONKIE APPRAISAL DISREGARDED MATERIAL FACTORS OF TOPOGRAPHY, REGULATORY CONSTRAINTS AND UNAVAILABILITY OF KEY SERVICES; NPCA HAS STANDING TO ASSERT THOSE CLAIMS.

The McConkie "Restricted Use Appraisal" was clearly inadequate to satisfy the remand in NPCA v. Board of State Lands because its valuation calculations presumed full development of all 40-acre parcels in Park Section 16. R. 153. In doing so, it gave no consideration to the large portions of that Section comprised of extremely steep topography, the regulatory constraints likely to limit development, or the actual unavailability of water or electric utility service. Failure to consider these factors

disregarded basic appraisal standards and rules under the Uniform Standards of Professional Appraisal Practice, Standard Rule 1-2⁵ with which the appraisal claimed to comply, including the following:

In developing a real property appraisal, an appraiser must:

- (e) identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, including (I) its location and physical, legal and economic attributes; . . . [and] (iv) any known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature; and
- (f) identify an extraordinary assumptions⁶ necessary to the assignment [which must have “a reasonable basis” and must be disclosed].

(Emphasis added.)

Neither SITLA nor the SITLA Board’s dismissal order ever addressed the key factors identified by NPCA as disregarded by the appraisal. Nor did it address the express admission in the McConkie appraisal that “this parcel consists of land that is very irregular in terrain with steep sandstone cliffs and rocky terrain as well as some limited open space,” and that it “has limited utility, if any.” Exhibit B at 3. 6, R. 143, 146. Purporting to “assume for the purposes of the pending motion that NPCA’s assertions are correct,”

⁵ Promulgated by The Appraisal Foundation, available at the Appraisal Foundation web site, http://www.appraisalfoundation.org/s_appraisal/sec.asp?CID=3&DID=,3 at the following link: <http://commerce.appraisalfoundation.org/html/2006%20USPAP/std1.htm>.

⁶ The Definition Section of the Uniform Standards of Professional Appraisal Practice defines an “extraordinary assumption” as “an assumption, directly related to a specific assignment, which, if found to be false, could alter the appraiser’s opinions or conclusions.” A Comment accompanying the section explains that “Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property”

the Board simply asserted that “NPCA’s factual contentions on valuation issues are so contradictory as to be impossible to reconcile,” while ignoring NPCA’s actual contention: that these facts further intensify the unlawful value disparities of Exchange 188. Rather, the Board simply concluded that it “need not resolve these inconsistencies” because NPCA lacks standing to intervene in exchange transactions. Order at 15-17, R. 530-32. On that basis, without further explanation, the SITLA Board disregarded the relevance, materiality and valuation significance of matters that professional appraisal standards treat as central to an adequate and proper appraisal.

In dismissing this claim for lack of standing, the SITLA Board, apparently unwittingly, disregarded its admitted obligation, under its applicable review standards, to assume the correctness of NPCA’S allegations. If NPCA’s allegations – both the material factors claimed and their disregard by the McConkie appraisal – were accepted as correct for purposes of dismissal, then it was irrelevant and unlawful to erect “standing” as a bar to their consideration. No standing to intervene in the appraisal proceedings was necessary: the issue presented was whether the facts asserted by NPCA, “assumed” to be correct but disregarded by the appraisal, required new consideration and judgment by SITLA and the SITLA Board. That determination could be made by the agency without NPCA’s actual participation in further appraisal proceedings. Moreover, apart from any limitations on intervention, SITLA has not challenged NPCA’s standing to raise these questions under its recent standing jurisprudence in Sierra Club v. Utah Air Quality Board

and Sevier Power Co., 2006 UT 74, 148 P.3d 960 (2006); Utah Chapter of the Sierra Club, v. Utah Air Quality Board and Intermountain Power Service Corp., 2006 UT 73, 148 P.3d 975 (2006).

II. AS A “LIMITED RESTRICTED USE REPORT,” THE McCONKIE APPRAISAL FAILED TO FULFILL THIS COURT’S REQUIREMENTS FOR A “RELIABLE APPRAISAL.”

The McConkie appraisal also provided an unreliable basis for valuation because it was a “Limited Restricted Use Report” which even the appraiser acknowledged “presents no discussions of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser’s opinion of value.” McConkie Appraisal, 1-2, Exhibit B to SITLA Motion to Dismiss, R. 141-42. The appraiser acknowledged that, under an undisclosed “prior agreement with the client,” the appraisal utilized only “a limited appraisal process in that certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practice were invoked.” Although the “departures” from appraisal standards were not identified, the appraisal warned “that the reliability of the value conclusion may be impactedId. at 1-2, R. 141-42.

The unreliability of this kind of appraisal report for public assurance and review were also emphasized in the Appraisal Review by Appraisers J. Philip Cook and Virginia H. Hylton submitted by NPCA. They described this type of report as “specific to the needs of the client, “explaining that it does “not contain sufficient information for an unrelated third party to fully understand the report” and therefore “cannot be relied upon

by anyone other than the client.” “Appraisal Review (A Portion) Of Moreley & McConkie, L.C., Sanford S. McConkie, MAI Appraisal Dated August 25, 2005" by appraisers J. Philip Cook and Virginia H. Hylton (July 25, 2006) at 1-2, Exhibit D to SITLA Motion to Dismiss, R. 170-71.

While expressing no approval or endorsement of an alternative valuation methodology favored by the reviewers, NPCA’s appeal emphasized that the unreliability of the McConkie Restricted Use Appraisal Report is inherent in its departures from appraisal transparency highlighted by the Appraisal review and admitted by the McConkie appraisal itself. In summary, NPCA emphasized that it:

- * presented “no discussions of the data, reasoning, and analysis that were used in the appraisal process”;

- * withheld “[s]upporting documentation concerning the data, reasoning and analysis” which were “retained in the appraiser’s files”;

- * invoked “certain allowable departures from specific guidelines of the Uniform Standards of Professional Appraisal Practice”; and

- * required a warning in the appraisal document itself that “the reliability of the value conclusion provided may be impacted”; and

- * presented so little appraisal data and analyses that the Appraisal Review emphasized that it lacked “sufficient information for an unrelated third party to fully

understand the report.” Letter from NPCA Counsel to Kevin S. Carter, August 29, 2006 at 3, R. 164; Appeal from Final Agency Action at 6-7, R. 33-34.

Although such an appraisal may serve undisclosed purposes of a client, it cannot be sufficient where important public interests are likely to be significantly adversely affected by the appraisal. Neither NPCA nor other members of the public had any way of assessing the reliability or accuracy of the information or analysis, or the reasons for deviation from full disclosure and standard appraisal practices. Lacking basic transparency, it was impossible for the public – or any reviewers – to ensure that the appraisal avoided the “sharp practices” or other irrelevancies of concern to the Supreme court in ordering a new appraisal in NPCA-I, 869 P.2d at 922.

III. THE ADMITTED 330.5% DISPARITY BETWEEN THE CONSIDERATION GIVEN AND THAT RECEIVED BY GARFIELD COUNTY, IF ACCEPTED AS CORRECT, DISCLOSES AN UNLAWFUL TRANSACTION UNDER THIS COURT’S PRECEDENTS WHICH COULD INITIALLY HAVE BEEN ADDRESSED BY INTERIM MEASURES WITHIN SITLA AUTHORITY TO INITIATE.

Seeking SITLA reconsideration of the Exchange 188 disposition of Park Section 16, NPCA’s administrative appeal argued not only that the McConkie appraisal was inadequate and unreliable, but also that the disparity of values it attributed to the exchange properties demonstrated clear unlawfulness of the transaction. Moreover, that disparity would surely be wider if the inadequacies of the appraisal emphasized above had been properly considered.

The SITLA Board acknowledged the 330.5% disparity of values, and that NPCA was “correct” in arguing that “local governments may not dispose of real property without adequate compensation.” It specifically acknowledged the controlling authority of that requirement, established under Municipal Building Authority of Iron County v. Lowder, 711 P.2d 273 (Utah 1985) and Salt Lake County Com'n v. Salt Lake Co. Atty, 1999 UT 73, 985 P.2d 899, relying on Sears v. Ogden City, Utah, 533 P.2d 118 (1975); cf. Price Development Co., L.P. v. Orem City, 2000 UT 26, 995 P.2d 1237.⁷ Order at 11, R. 526.

Nonetheless, the Board dismissed NPCA’s appeal, relying on a rigidly narrow interpretation of the remand order in NPCA-I, asserting that the order barred it from considering the unlawfulness of consideration. The Board contended that the remand confined SITLA to a single issue: “whether . . . the value of the land exchanged for Section 16 is adequate under its trust obligations.” Order at 11, R. 526. On that ground, the Board concluded that the agency was “not authorized to undertake a full-fledged review of other issues that NPCA might seek to raise,” particularly since the Court had denied NPCA any right to intervene in “executive decisions” to convey land. Order at 12, R. 527.

⁷ In 2000 the statutes construed in the cited cases to incorporate the adequate consideration requirement (U.C.A. sections 17-4-3 and 17-5-48) were renumbered with modifications of the latter not pertinent to that court-imposed restriction. See renumbered sections 17-50-302 and 17-50-312.

There is no basis for the Board's narrow reading of the remand order in NPCA-I. It is true that the order focused on the need to obtain an appraisal independently of Garfield County, for the obvious reason that the County's sponsorship of the first appraisal rendered it invalid. But nothing in the Court's order suggested that SITLA must ignore other illegal aspects of the exchange transaction revealed by a subsequent appraisal. To the contrary, the very purpose of an independent appraisal is to ensure a lawful exchange of values. Moreover, the opinion in NPCA-I was explicit on the point, saying: "Clearly, trustees have a duty to act according to applicable law." 869 P.2d at 921.

Moreover, the Board's reasoning wholly disregarded the actual content of NPCA's claims on administrative appeal and the context in which they were made. NPCA's claims sought only SITLA consideration of substantive criticisms of the completed appraisal report and transaction. No direct participation in SITLA's proceedings was sought. NPCA urged only that its criticisms be accepted as a basis for further steps by SITLA to restructure any disposition of Park Section 16 in a manner that could facilitate acquisition, at fair value, by an entity committed to protection of its noneconomic values.

Finally, contrary to SITLA Board's argument that it lacked jurisdiction to invalidate the deeds previously exchanged, Order at 12-13, 527-28, NPCA did not seek that result from the Board. Rather, NPCA contended that the Board had ample authority to take interim steps toward preserving the status quo pending further remedies for the unlawful transaction, and deferring ultimate completion of the transaction. The Board's Order did

not explain why SITLA, recognizing the illegality of the transaction, could not exercise its broad authority and duty to “ensure that the administration is managed according to law,” U.C.A. § 53C-1-204(2), by taking interim steps pending further action to address the illegality. None of the interim steps suggested by NPCA⁸ were considered, nor was their rejection explained.

IV. NEITHER THE “CLAIM PRECLUSION” NOR THE “ISSUE PRECLUSION” BRANCHES OF THE RES JUDICATA DOCTRINE FORECLOSE NPCA’S CHALLENGE TO THE UNLAWFUL CONSIDERATION TO GARFIELD COUNTY DISCLOSED BY THE McCONKIE APPRAISAL.

The SITLA Board’s Order argues that NPCA is barred by res judicata from raising the issue of inadequate consideration to Garfield County, apparently relying on the belief that NPCA should have asserted that claim on the basis of values recited in the original invalid appraisal. Order at 12, R. 527. Yet the very point of NPCA-I was that the original appraisal had no authority. Nor could NPCA have anticipated the vastly greater disparity disclosed by the McConkie appraisal.

⁸ NPCA suggested that, among other possible steps, the SILA Board could stay the effectiveness of SITLA’s approval of the appraisal; or give notice to avoid actions or dispositions affecting the exchanged lands; or request mutual rescission of the deeds pending possible renegotiation; or initiate proceedings to reform the deeds to provide for disposition of alternative properties; or itself initiate legal action seeking appropriate mandatory or declaratory remedies; or in anticipation of legal action request an opinion of the Attorney General regarding legality of the transaction and appropriate remedies. Appellant’s Response to Proposed Order at 11, R. 456.

Recent Utah Supreme Court precedent is very clear that “a plaintiff need only include claims in a suit for res judicata purposes if the plaintiff was aware of the facts upon which the later claims were based at the time the first suit was filed.” Macris & Associates, Inc. v. Neways, Inc., 2000 UT 23, ¶24, 16 P.3d 1214, at 1220 (Utah 2000). Since the only appraisal previously available as the basis for assessing possible illegality of consideration was held invalid ab initio, and the disputed appraisal did not exist when NPCA-I was litigated, there was no way for NPCA then to have ascertained the unlawful disparity or presented that claim. In addition, except for NPCA’s participation as a party in both cases, the disparity claim meets none of the conditions for collateral estoppel required by Macris & Associates, Inc., supra. Specifically, the claim was neither challenged, nor is it identical with, the claims in NPCA-I, nor was it in any manner litigated; and the issue was neither address nor decided in the prior case. Moreover, even identity of parties is not fully satisfied because appellant William Wolverton, a Garfield County taxpayer with standing to complain about inadequate consideration to the County, was not a party in the 1993 case. In short, neither branch of the res judicata doctrine applies.

V. IN ADDRESSING THE APPRAISAL ERRORS AND UNLAWFUL CONSIDERATION, SITLA SHOULD SUSPEND ITS APPROVAL OF THE McCONKIE APPRAISAL, INITIATE PROCEEDINGS TO INVALIDATE THE PREVIOUSLY-EXCHANGED DEEDS, AND GIVE FULL CONSIDERATION TO THE FEASIBILITY OF STRUCTURING AN ALTERNATIVE DISPOSITION, AT FAIR VALUE, TO AN ENTITY COMMITTED TO PROTECTING THE NONECONOMIC “UNIQUE SCENIC, PALEONTOLOGICAL, AND ARCHEOLOGICAL VALUES” OF PARK SECTION 16 IN ACCORDANCE WITH THIS COURT’S GUIDANCE IN NPCA-I.

Because Exchange 188 has not yet been validated by an adequate appraisal, and fails for inadequate consideration to the County, the SITLA Board should exercise its discretion and authority to reconsider the exchange and initiate consideration of an alternative disposition for Section 16, giving weight to the following highly relevant factors:

(1) its authority to suspend its approval of the McConkie appraisal while pursuing remedies to reverse the previous exchange of deeds; and

(2) the concerns emphasized by the Court in NPCA v. Board of State Lands regarding alternative dispositions that will protect trust lands having important noneconomic values, giving full consideration to the statutory preservation and protection goals for national park lands, specifically including Sec. 16; and

(3) the feasibility of structuring a new transaction for disposition of Park Section 16, with fair value to the school trust, for conveyance of the section to an entity committed to providing such protection.

Although NPCA has not contested the SITLA Board's continuance of its appeal from SITLA's denial of its Rulemaking proposal, which sought a rule to similar effect, it explicitly reserved its claim that --

a proper lower valuation of Section 16, if established in further appraisal proceedings, should be considered by the Board as the basis for an alternative exchange or purchase on conditions that will protect the natural and aesthetic values of the section while returning fair value to the trust.

Appellant's Response to Proposed Order at 14-15, R. 459-60.

The SITLA Board has simply declined to provide any analysis or explanation for refusing to consider such an alternative disposition, except to reject NPCA's substantive challenges and misconstrue NPCA's appeal as a reassertion of its rejected claim in NPCA-I that "priority" must be given to protection. Order at 18, R. 533. To the contrary, NPCA's claims recognize that the Board has a substantial range of discretion in structuring dispositions of trust lands. But because Exchange 188 continues to fail both appraisal and legal standards, NPCA urges that the agency has obligations both to meet legal requirements, and to offer rational grounds for declining even to consider an alternative transaction that would return fair value to the trust while also meeting the concerns for protection of noneconomic values so forcefully expressed in NPCA-I.

CONCLUSION

In dismissing NPCA's administrative appeal, the SITLA Board failed to address the merits of every factual and legal contention presented. It failed to address or explain --

* how an appraisal purporting to rely on a values attributed to development of an entire section of land could be adequate where it fails even to consider the dominant topographic, economic and regulatory limitations on development;

* how an appraisal that withholds from the public most data and analysis, as well as the terms or conditions on which the appraisal is provided, can fulfill the basic purpose of public accountability;

* what limitations on agency authority and discretion bar it from taking administrative steps, short of adjudication of deeds, to avert a transaction that is admitted to involve a clearly unlawful disposition of property by a local government entity; and

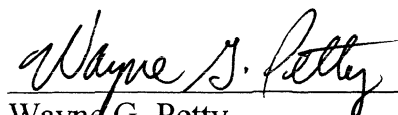
* what limitations on agency authority and discretion bar it from taking administrative steps to reject or reconsider a land exchange with all these deficiencies and consider an alternative disposition, with fair value to the school trust, that can better ensure protection of important noneconomic values on trust property.

NPCA acknowledges that NPCA-I expressions of concern about protection of noneconomic values on trust lands were technically “dictum.” But NPCA’s emphasis in its administrative appeal has been upon the duty to give reasonable consideration to those concerns in the context of making a decision about disposition of such lands – where the continuing inadequacies of Exchange 188 offer occasion for that reconsideration. Although the Court’s discussion of these concerns was “dictum” in a formal sense, it authoritatively identified important factors highly relevant to such dispositions. SITLA

does bear a duty of reasoned decision that adequately considers and explains the agency's disposition of well-supported claims. Committee of Consumer Services v. Public Service Commission of Utah, 2003 UT 29, ¶ 13, 75 P.3d 481, 485-86 (agency provided "neither an adequate nor a fair and rational basis" for dispensing with required analysis); Gibson v. Department of Employment Sec., 840 P.2d 780 (Utah App., 1992) (Board failed to discuss consideration or weight given to relevant factors). That duty surely requires explained consideration of factors which the Supreme Court itself identified as important in disposition of lands having significant noneconomic values. In dismissing NPCA's appeal, the SITLA Board gave these factors no apparent consideration. It is NPCA's contention that this failure was arbitrary, capricious and an abuse of discretion, requiring remand to the SITLA Board for a lawful decision.

Respectfully submitted this 22nd day of February, 2008.

MOYLE & DRAPER, P.C.

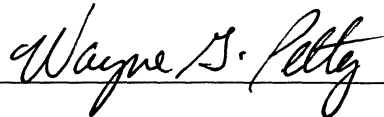

Wayne G. Petty

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing document via U.S. Mail, postage prepaid
on the 22nd day of February 2008 to the following:

Barry L. Huntington
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Thomas A. Mitchell
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Administration
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Salt Lake City, Utah 84102



ADDENDUM

THE BOARD OF TRUSTEES
OF THE SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION

In the Consolidated Matter of:
Appeal from Final Agency Action
Requested by
National Parks Conservation Association
and William Wolverton

ORDER: (1) SEPARATING
ADJUDICATIVE PROCEEDINGS; (2)
GRANTING STATE'S MOTION TO
DISMISS APPEAL OF AGENCY
ACTION RE EXCHANGE NO. 188; AND
(3) CONTINUING CONSIDERATION OF
REQUEST FOR RULEMAKING

This Order is adopted by the School and Institutional Trust Lands Administration's
Board of Trustees in the above-entitled formal administrative adjudication..

INTRODUCTION

This adjudicative proceeding involves an appeal by the National Parks and
Conservation Association ("NPCA") and NPCA member William Wolverton
(collectively "Petitioners") of final decisions by the Director of the School and
Institutional Trust Lands Administration ("SITLA") to: (1) approve the valuation of state
trust lands and non-trust lands involved in State Exchange 188 on remand from the Utah
Supreme Court in the case of *National Parks and Conservation Association v. Board of
State Lands*, 869 P. 2d 909 (Utah 1993); and (2) deny NPCA's Petition for a Rule Change
pursuant to Utah Code Ann. § 63-46a-12.

The Board of Trustees for SITLA (the "Board") has jurisdiction to hear
Petitioners' appeal pursuant to Utah Code Ann. 53C-1-304(2). On October 19, 2006, the
Board conducted an initial hearing in this adjudication pursuant to Utah Administrative
Code R850-8-1000(6), and determined that it would conduct the adjudication of the

appeals as a formal adjudicative proceeding pursuant to Utah Administrative Code R850-8-1300. The Board appointed Board member James Lee as hearing examiner to conduct all proceedings in the adjudications, pursuant to *Utah Administrative Code* R850-8-1500(2). On November 10, 2006, SITLA moved to dismiss Petitioners' appeal both as to State Exchange 188 and as to the denial of the Petition of a Rule Change, for failure to state a cause of action. On December 13, 2006, the hearing examiner granted Garfield County limited intervenor status solely for purposes of contesting NPCA/Wolverton's appeal of SITLA's decision in the Exchange No. 188 matter. After briefing by the parties, the hearing examiner heard oral arguments on March 14, 2007. The hearing examiner submitted a proposed order in this proceeding for consideration by the Board, which order is now adopted by the Board.

STANDARD OF REVIEW

Utah Code Ann. § 53C-1-304 authorizes the Board to adjudicate appeals from final actions by the Director of SITLA. The Board is required to uphold the final action of the Director unless it finds, by a preponderance of the evidence, that the agency action violated applicable law, rules, or Board policy. This matter is before the Board on SITLA's Motion to Dismiss for failure to state a cause of action, pursuant to U.R.C.P. 12(b)(6). In reviewing a Motion to Dismiss, the Board must construe the pleadings in the light most favorable to the Petitioners, and indulge all reasonable inferences in their favor. *Mounteer v. Utah Power & Light*, 823 P. 2d 1055 (Utah 1991). Where, as here, the parties have chosen to submit materials outside the pleadings, the Board may treat the pending Motion to Dismiss as a Motion for Summary Judgment under U.R.C.P. 56. U.R.C.P. 12(c). The Board must consider only facts that are not in dispute, *Sorenson v.*

Beers, 585 P.2d 458 (Utah 1978), and may rule in favor of the movant only if it appears as a matter of law that the Petitioners cannot prevail. *Harvey v. Sanders*, 534 P.2d 905 (Utah 1975).

FINDINGS OF FACT

The Board finds that the following facts are undisputed, based upon the materials submitted by the parties or officially noted by the Board:

State Exchange No. 188

1. This adjudication arises from a 1987 land exchange between the State of Utah, acting through the Division of State Lands & Forestry (the “Division”) and Garfield County. The facts of that exchange are set forth in the opinion of the Supreme Court in *National Parks and Conservation Association v. Board of State Lands*, 869 P. 2d 909 (Utah 1993) (the “NPCA decision”), and are incorporated by reference in this Order.
2. The land that is the subject of this dispute is a 640 acre section of former state school trust land that is located within the boundaries of Capitol Reef National Park in Garfield County, and is legally described as section 16, Township 34 South, Range 8 East, Salt Lake Base and Meridian (the “Subject Property” or “Section 16”). The Subject Property is traversed by a county road known as the Burr Trail, which has been the subject of substantial environmental controversy. *NPCA*, 869 P.2d at 911.
3. In 1987, Garfield County sought to acquire the Subject Property from the State in exchange for several parcels of land owned by the County elsewhere in the County, and in the Richfield City Industrial Park. *Id.*; SITLA Statement of Facts ¶ 1; Petitioners’ Statement of Facts ¶ 1.

4. NPCA sought to intervene in the land exchange proceedings by petition to the Division dated October 14, 1987. This petition was denied by the Division on November 16, 1987. *NPCA*, 869 P.2d at 912.

5. NPCA also filed requests for declaratory rulings from the Division with respect to the proposed land exchange under a now-repealed statute requiring administrative agencies to hear petitions for declaratory rulings, Utah Code Ann. § 63-46a-15 (repealed effective April 25, 1988). On December 21, 1987, the Division denied certain of NPCA's requests, and refused to respond to others. *Id.*

6. On December 24, 1987, the Governor consummated the land exchange by executing a patent conveying the Subject Property to Garfield County. *Id.*

7. NPCA subsequently filed a writ of review with the Utah Supreme Court challenging the Division's actions in approving the exchange, and the Division's denial of its petitions for declaratory rulings. *Id.*

The Supreme Court Litigation

8. In its June 24, 1993 opinion, the Utah Supreme Court determined that NPCA had standing to challenge the Division's actions with respect to the exchange. 869 P.2d at 913-4. The Court then denied NPCA's petition to intervene in the land exchange transaction, on the basis that there was no statutory authorization for third-party intervention in the state's determination to dispose of real property. *Id.* at 914-5.

9. The Supreme Court then addressed NPCA's requests for declaratory rulings, which had been denied or not considered by the Division. The Court upheld the Division's determinations with respect to the scope and nature of its trust responsibilities concerning school trust lands. However, the Court determined that the Division had

improperly relied on land appraisals submitted by Garfield County for the lands to be exchanged, rather than commissioning its own independent appraisals. The Court found that the Division's fiduciary responsibilities to the school trust required it to obtain independent appraisals of trust assets before conveying such lands, and that failure to do so breached the Division's trust duties. 869 P.2d at 922.

10. The Supreme Court remanded the case to the Division for a determination of whether the appraised values of the Subject Property and the lands offered by Garfield County represented the full value of those lands. 869 P.2d at 923.

The Current Valuation Dispute

11. The Supreme Court denied rehearing in the case on March 26, 1994. On July 1, 1994, the Division of State Lands & Forestry went out of existence, the legislature having transferred responsibility for management of the state's school and institutional trust lands to the newly-created School and Institutional Trust Lands Administration pursuant to the Utah School and Institutional Trust Lands Management Act, *Utah Code Ann.* §§ 53C-1-101 *et seq.*

12. After receiving a third-party request to purchase certain of the exchange lands, SITLA determined that the Division had not completed the review of appraised values directed by the Supreme Court prior to going out of existence. In order to comply with the Supreme Court's direction, SITLA retained an independent appraisal firm, Morley & McConkie, L.C., to review valuation of the lands. SITLA Statement of Facts ¶ 16.

13. On August 25, 2005, Stanford S. McConkie, MAI of Morley & McConkie, L.C. submitted a review of valuation of the exchange lands entitled "Limited Restricted Use Report: Appraisal of Three Parcels of Land Located in Garfield County and Two

Industrial Lots Located in Richfield Sevier County Utah” (the “McConkie Appraisal”).

SITLA Memorandum, Exhibit B.

14. The McConkie Appraisal concluded that Section 16 was currently worth \$200,000, while the County exchange lands were currently worth \$661,200. SITLA Statement of Facts, ¶ 17. Petitioners dispute the adequacy and accuracy of the McConkie Appraisal. Petitioners Statement of Facts, ¶¶ 16-17.

15. On August 29, 2006, NPCA submitted to SITLA a review of the McConkie Appraisal prepared by J. Philip Cook, MAI and Virginia H. Hylton, Appraiser (the “Cook Appraisal Review”) which evaluated the McConkie Appraisal’s compliance with the Appraisal Foundation’s Uniform Standards for Professional Appraisal Practice (“USPAP”) and with the Appraisal Institute’s Code of Professional Ethics and Standards of Professional Appraisal Practice. SITLA Statement of Facts, ¶ 19; SITLA Memorandum, Exhibit D.

16. The Cook Appraisal Review found that the McConkie Appraisal complied with USPAP standards for a Restricted Use Appraisal Report. The Cook Appraisal Review disagreed with Mr. McConkie’s determination of the highest and best use of Section 16, and of the estimated time to market utilized by Mr. McConkie. The Cook Review concluded that the highest and best use of Section 16 was as a secluded single user vacation retreat, rather than 40 acre lots as concluded by Mr. McConkie, and that this would result in a higher present value than concluded by Mr. McConkie. Cook Appraisal Review at 4.

17. On September 25, 2006, SITLA’s Director took formal action and determined that, based upon the McConkie Appraisal and SITLA’s staff review and concurrence, that

the school trust had obtained full value in the exchange, for purposes of compliance with the Supreme Court's remand in the *NPCA* litigation. SITLA Statement of Facts, ¶ 25; SITLA Memorandum, Exhibit H.

18. Petitioners timely filed their appeal of the Director's decision to approve the exchange valuations on September 29, 2006 in accordance with *Utah Code Ann.* § 53C-1-304(2) and *Utah Administrative Code* R850-8-1000 (2006).

The Rulemaking Appeal

19. On September 29, 2006, NPCA submitted a Petition for Rulemaking to SITLA pursuant to *Utah Code Ann.* § 63-46a-12 and *Utah Administrative Code* R. 15-2 (2006).

20. The NPCA Petition for Rulemaking was based upon the following language in the Supreme Court's opinion in *NPCA*:

We turn now to an issue that is of great importance to this state. Located on some state school lands are unique scenic, archaeological, and paleontological sites. Such treasures are legacies of past millennia whose value could never be expressed in monetary terms. The question is, can such treasures be preserved without violating the terms of the school trust? We think so....

The Division should recognize that some school lands have unique scenic, paleontological, and archaeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values. It may be possible for the Division to protect and preserve those values without diminishing the economic value of the land. For example, with appropriate restrictions it may be possible for livestock grazing and perhaps even mineral extraction to occur on a school section without damaging archaeological and paleontological sites. But when economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected, and the full economic value of the school trust lands still realized.

NPCA Petition for Rulemaking, ¶ 3, citing *NPCA*, 869 P. 2d at 920-1 (emphasis added by NPCA).

21. NPCA's Petition for Rulemaking requests that SITLA enact a rule that would: (1) require SITLA to take all feasible action to protect trust lands with "unique scenic, archaeological, and paleontological sites" or other noneconomic values and provide for disposition alternatives that will protect those values while realizing fair economic value to the school trust, including at a minimum all trust lands within National and State Parks, National Monuments, National Wildlife Refuges, and river corridors nominated for Wild and Scenic River status; (2) require SITLA, in consultation with the Governor, to take all feasible steps to have the state or federal government acquire the lands for protection by purchase or exchange, at fair appraised value; and (3) when appraising lands for conservation transactions, take into account all values accruing to the State of Utah or the public schools generally accruing from recreation, tourism and educational values of protecting the lands, and ecosystem services attributable to retention and preservation of the land. NPCA Petition, ¶¶ 1, 2, 4, 5.

22. On October 5, 2006, SITLA denied NPCA's request for rulemaking. SITLA Statement of Facts, ¶ 29; SITLA Memorandum, Exhibit K. NPCA timely appealed the denial by letter dated October 18, 2006.

23. On October 19, 2006, the Board conducted an initial hearing in both adjudications pursuant to Utah Administrative Code R850-8-1000(6), and determined that it would conduct the adjudication of the two appeals on a consolidated basis as a formal adjudicative proceeding pursuant to Utah Administrative Code R850-8-1300.

DISCUSSION

I. Introduction

The Board has carefully considered the opinion of the Supreme Court in the original *NPCA* litigation. The Supreme Court addressed multiple issues raised by *NPCA* with respect to the disputed land exchange, and finally adjudicated all but one: whether the value of the exchange lands conveyed by Garfield County represented fair value to the school trust. 869 P. 2d at 922-3. The Court remanded this and only this issue to the Division of State Lands & Forestry.

After the Division failed to address the remand before it went out of existence, SITLA staff subsequently discovered the lapse, and, as the current management agency for school trust lands, undertook the valuation review. This valuation review was based upon an independent appraisal commissioned by the agency, as specifically directed by the Supreme Court. The appraisal determined that, in the interval since the land exchange, the lands conveyed by Garfield County to the school trust, located near the Bryce Canyon airport and in the Richfield City industrial park, had increased in value proportionately more than the former Section 16, located inside Capitol Reef National Park. The appraiser concluded that the county lands now owned by the school trust were approximately 330% of the value of former Section 16, as opposed to a 150% ratio at the time of the exchange. Based upon this favorable valuation ratio, the Director of SITLA concluded that the exchange remained favorable to the school trust. The Director incorporated these conclusions in a formal finding dated September 15, 2006, in order to finally address the Supreme Court's direction on remand from the *NPCA* opinion.

The Petitioners appealed the Director's September 15, 2006 finding to the Board pursuant to *Utah Code Ann.* § 53C-1-304(2) and *Utah Administrative Code* R850-8-1000 (2006). Petitioners argue that:

- (1) the valuation ratio revealed by the McConkie Appraisal, which determined that the county lands conveyed to the school trust were now substantially more valuable than Section 16, revealed that the County had violated applicable law requiring the County to receive fair value for conveying county lands. NPCA Appeal, ¶ III(1), (2), at 5-6.
- (2) the McConkie Appraisal, because it was a "Restricted Use Report", i.e. a summary valuation report rather than a full narrative appraisal, did not satisfy the Supreme Court's requirement of an independent appraisal. NPCA Appeal, ¶ III(3), at 6.
- (3) the McConkie appraisal contains various flaws in its evaluation of terrain, presence of water and utilities, and legal constraints associated with the parcel's location within the exterior boundaries of Capitol Reef National Park. NPCA Appeal, ¶ III(3)(b)-(d), at 7.
- (4) in reviewing valuation of the exchange lands, SITLA should have considered the NPCA Court's direction that the State of Utah, when faced with the conflict between economic development and protection of certain school trust lands with unique scenic, paleontological, and archaeological values, may need to ensure protection of those values (in this case by voiding the Garfield County exchange and pursuing an alternative negotiated conservation transaction). NPCA Appeal, ¶ III(4), at 9-10.

The Board will address each of the Petitioners' contentions in turn.

II. Alleged Inadequate Consideration for County Lands.

The McConkie Appraisal found that the lands that the school trust obtained from Garfield County in the 1989 exchange had increased in value proportionately more than Section 16. At the time of the original exchange, the county lands were valued at \$98,500, while Section 16 was valued at \$65,000, a valuation ratio of 151.5 per cent in favor of the school trust. The McConkie appraisal found that by 2005, the value of the former county lands had increased to \$661,200, while Section 16 had increased in value to \$200,000, resulting in an increased a valuation ratio of 330.5%.

NPCA argues that the Board should void the exchange between Garfield County and the Division because Utah law required the County to obtain adequate compensation in exchange for the county lands, and the 330.5% current valuation ratio indicates that the County did not receive adequate compensation. NPCA Appeal at 5-6. NPCA is correct that as a general matter, local governments may not dispose of real property without adequate compensation. *Municipal Building Authority of Iron County v. Lowder*, 711 P.2d 273, 282-3 (Utah 1985); *Sears v. Ogden City*, 533 P.2d 118, 119 (Utah 1975). However, the Board finds that it does not have jurisdiction to set aside the exchange on the basis of the County receiving inadequate compensation, because such a determination would be both beyond the scope of the Supreme Court's remand, and beyond the Board's statutory powers in any event.

The Supreme Court's remand of the original *NPCA* case to the Division was limited and specific: the Division was to determine whether "...the value of the land exchanged for section 16 is adequate under its trust obligations." 869 P.2d at 923. The

Division (and its successor SITLA) was not authorized to undertake a full-fledged review of other issues that NPCA might seek to raise at that time; in fact, the Supreme Court specifically held that NPCA was not entitled to intervene at the agency level to challenge the Division's executive determination to convey lands, since to allow private entities to force adjudication of any of the myriad realty transactions undertaken by the state could paralyze the state's ability to acquire and dispose of property. 869 P.2d at 914, *citing Terracor v. Utah Bd. of State Lands*, 716 P.2d 796 (Utah 1986). The Supreme Court stated that the appropriate method of challenging a purportedly illegal conveyance would be through an action for injunctive relief in the District Court, where a factual record could be developed and the legality of the agency action tested against governing law. *Id.*

NPCA would have SITLA, and this Board, unilaterally determine that Garfield County acted illegally when it conveyed the lands to the State of Utah because the County allegedly did not receive adequate compensation. This determination would be well beyond the scope of the Supreme Court's specific remand, which was limited to determination of the adequacy of compensation to the school trust. The Board also points out that the imbalance between the value of lands granted by the county and section 16 was expressly noted by the Supreme Court. 869 P.2d at 912. NPCA could have raised this issue at that time, either before the Supreme Court or in an independent action. By failing to raise the imbalance issue at that time, NPCA is now barred by the doctrine of res judicata from raising the issue now. *Penrod v. Nu Creation Crème, Inc.*, 669 P. 2d 873, 875 (Utah 1983). .

NPCA's contentions would also require the Board to act beyond its jurisdiction. In its statutory capacity as an adjudicative body, the SITLA Board's jurisdiction is

limited to the powers expressly granted to it by the Utah legislature. *High Country Estates Homeowners Ass'n v. Bagley & Company*, 901 P.2d 1017 (Utah 1995), on remand 928 P.2d 1047, cert. den. 937 P.2d 137; *Bevans v. Industrial Comm'n of Utah*, 790 P.2d 573, 576 (Utah App. 1990). Here, the legislature has not given this Board the authority to adjudicate whether Garfield County exceeded its powers by conveying lands for purportedly inadequate consideration. Title to Section 16 has been in Garfield County for almost 20 years. Neither SITLA nor the Board has any legislatively-granted power to unilaterally adjudicate that a prior conveyance by the State was invalid because of the grantee's lack of authority. That is the role of the courts, a role that this Board will not usurp.

III. Adequacy of the McConkie Appraisal.

A. Legal Adequacy of a Restricted Use Appraisal.

NPCA next argues that SITLA's use of a restricted appraisal report, instead of a full narrative appraisal, did not satisfy the Supreme Court's directive on remand that the Division determine whether value of the land exchanged for Section 16 represented full and adequate value for the school trust. The report relied upon by SITLA was prepared by Stanford S. McConkie, MAI and was entitled "Limited Restricted Use Report: Appraisal of Three Parcels of Land Located in Garfield County and Two Industrial Lots Located in Richfield Sevier County Utah." Counsel for SITLA stated at oral argument that a restricted appraisal, rather than a full narrative appraisal, was deemed adequate by SITLA for the agency's internal review of the valuation of the exchange parcels, and was less expensive than a narrative appraisal. Transcript at 28-29. The McConkie Appraisal states that it was intended as a Restricted Use Appraisal Report set forth under Standards

Rule 2-2(c) of the Uniform Standards for Professional Appraisal Practice (“USPAP”), and was the result of a limited appraisal process that departed in some respects from specific USPAP guidelines, which could impact the reliability of the value conclusions provided. McConkie Appraisal at 2.

NPCA obtained a review of the McConkie Appraisal from J. Philip Cook, MAI, which was dated July 25, 2006. The Cook Review stated that the McConkie Appraisal was compliant in form with USPAP and with the Appraisal Institute’s Code of Professional Ethics and Standards of Professional Appraisal Practice. Cook Review at 4. However, Mr. Cook noted that he disagreed with the McConkie report’s assumption that the highest and best use of Section 16 could be obtained by subdividing the property into 40 acre lots. Mr. Cook concluded that the highest and best use of Section 16 was to market the property as a single large parcel to an out-of-state investor for exclusive vacation use. A corollary of this conclusion was that Mr. Cook felt that Mr. McConkie had overestimated the marketing time for the property, which would be less for a single sale than for multiple lots. In its briefing, NPCA also argued that the McConkie appraisal had failed to consider the location of Section 16 inside Capitol Reef National Park, which NPCA alleged would preclude any use inconsistent with park purposes, depressing the value of the parcel. NPCA Opposition at 7-10.

NPCA’s arguments require the Board to answer two questions about the McConkie appraisal. First, based upon the facts alleged by NPCA, was SITLA’s use of a restricted use appraisal sufficient as a matter of law to meet the Supreme Court’s mandate on remand? If so, what is the legal effect of the alleged factual errors in the McConkie appraisal?

The Board concludes that SITLA's use of a restricted use appraisal was sufficient to meet the Supreme Court's mandate. The Supreme Court specifically directed the Division to determine independently (i.e. without reliance on Garfield County's appraisals) whether full compensation had been achieved by the school trust. In USPAP's discussions of allowable types of appraisals, the Appraisal Foundation specifically states: "When the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided." USPAP Standards Rule 2-2, Comment, available at <http://commerce.appraisal foundation.org>. USPAP Standard 2-2(c) sets specific standards for this type of appraisal. *Id.* Although Mr. Cook disagreed with factual conclusions drawn by Mr. McConkie as to highest and best use, he stated that the McConkie appraisal was compliant with all requirements of USPAP for such an appraisal. Because the directive of the Supreme Court in NPCA was for the Division to determine for the benefit of the school trust whether value had been achieved, a restricted use appraisal (as defined and controlled by USPAP Standard 2, as was the case with the McConkie appraisal), was legally sufficient. The Supreme Court's directive was for an independent review of valuation, which was accomplished.

B. Technical Disputes with the McConkie Appraisal; Standing.

NPCA asserts that the McConkie Appraisal incorrectly assessed the terrain and utility access situation for Section 16, and disregarded the impact of the parcel's location inside Capitol Reef National Park on the parcels' value. The Board must assume for the purposes of the pending motion that NPCA's assertions are correct. That said, the Board is free to note that NPCA's factual contentions on valuation issues are so contradictory as to be impossible to reconcile. NPCA's principal argument, discussed above, is that the

exchange was illegal because the school trust received too much, with Garfield County receiving allegedly inadequate consideration. NPCA's review appraiser, Mr. Cook criticizes the McConkie Appraisal for using exposure times and a highest and best use that would lead to a reduced value conclusion, in contrast to Mr. Cook's conclusion that the section would have substantial value as a private retreat. NPCA then devotes substantial argument to the exact opposite proposition -- that Section 16 is not worth much of anything, both because it is located within Capitol Reef National Park, and purportedly subject to National Park Service regulations that would preclude economic use, and because of adverse terrain and utility access. Transcript at 17-19.

The Board need not resolve these inconsistencies. In *NPCA*, the Supreme Court specifically denied NPCA the right to intervene in the exchange transaction. The Court articulated the sound policy for denying third party intervention into executive real property decisions:

The reason for allowing the state to deal with leasing, selling, and exchanging property as an executive decision is not difficult to ascertain. The state, through its various agencies, engages in innumerable transactions for the purchase, sale, exchange, and lease of real and personal property. If these transactions were subject to the delay inherent in adjudicative proceedings at the demand of a third party asserting a private interest, government programs dealing with the acquisition and disposition of property could be paralyzed. *See Terracor v. Utah Bd. Of State Lands*, 716 P. 2d 796 (Utah 1986).

869 P. 2d at 914. In the *Terracor* case cited by the *NPCA* court, the Utah Supreme Court held that, in dispositions of school trust properties, the school trust beneficiaries are the most appropriate party to challenge a conveyance of trust lands, and that third parties would not have standing to do so. *See also Forest Guardians v. Powell*, 24 P.3d 803

(N.M. App. 2001)(conservation groups lack standing to assert the interests of trust beneficiaries in challenge to school trust actions).

In the original *NPCA* litigation, the Supreme Court granted NPCA standing to raise a policy issue: the overall scope and nature of the state's school trust obligation. At the same time, it declined on policy grounds to allow NPCA to intervene in the State's executive decisionmaking concerning the conveyance of lands. The Board finds that, on remand, the Petitioners do not have standing to attack SITLA's substantive internal decisionmaking concerning the specific values of the lands committed to a state land exchange. Indeed, the contradictory quilt of valuation assertions made by NPCA illustrates the Supreme Court's wisdom in insulating executive real estate decisions from the adjudicative process. If third parties could take issue with multiple aspects of the value of trust lands in every trust lands exchange or sale, the school trust would, as the Supreme Court warned, risk paralysis in fulfilling its statutory purpose. The purpose of the Supreme Court's remand was for the Division/SITLA to obtain an independent valuation of the exchange lands and determine adequacy for purposes of the state's trust beneficiaries. That direction has unquestionably been fulfilled.

IV. Consideration of the Unique Attributes of Section 16 under NPCA.

NPCA next argues that SITLA's approval of the exchange values on remand violated two duties enunciated by the Supreme Court in the *NPCA* opinion. First, NPCA claims that SITLA violated the Supreme Court's comment that:

The Division should recognize that some school lands have unique scenic, paleontological, and archaeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values.... [W]hen economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for

school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected, and the full economic value of the school trust lands still realized. 869 P.2d at 921.

Second, NPCA contends that SITLA violated the principle enunciated by the Court that trustees, including the State as trustee of Utah's school trust, have a duty to act in accordance with applicable law. NPCA argues that by allowing Garfield County to receive inadequate compensation, and by approving a transaction that NPCA believes does not comply with the Court's statement regarding protection of non-economic values, SITLA is violating applicable law. NPCA Appeal at 9-10.

The Board believes that NPCA has completely misconstrued the obligation placed on SITLA by the *NPCA* opinion, as it relates to the case now before the Board. . The Supreme Court stated that "in some cases" the State may have the obligation to protect unique noneconomic values on trust lands by considering exchange or protective purchase of the lands. However, it found that the Division had in fact adequately considered aesthetic and recreational values in deciding to exchange Section 16. 869 P.2d at 921. It further found that the Board of State Lands & Forestry had acted correctly in refusing to give priority to the scenic, aesthetic, and recreational values of section 16 over economic values when it approved the exchange. *Id.*

The Supreme Court has thus fully adjudicated the issues raised by NPCA here. The Supreme Court's determination is binding on NPCA, and on this Board, as res judicata. All are beyond the scope of the Supreme Court's remand to the Division. Indeed, the Board is mystified as to how NPCA believes that the Board could, twenty years after conveyance of Section 16 to Garfield County and thirteen years after the Supreme Court's ruling on these issues, somehow have the power to divest the County of

title to Section 16 and unwind the exchange in opposition to the Supreme Court's ruling to the contrary. NPCA's claims that SITLA violated the *NPCA* decision in this regard fail as a matter of law.

V. Separation and Further Consideration of NPCA's Petition for Rulemaking.

Contemporaneously with its appeal of SITLA's decision to approve the land exchange values on remand from the Supreme Court, NPCA filed a petition for rulemaking with SITLA pursuant to *Utah Code Ann.* § 63-46a-12 and *Utah Administrative Code R.* 15-2 (2006). NPCA's Petition for Rulemaking was based on the language in the *NPCA* decision concerning the State's obligation in some cases to protect trust lands with "unique" noneconomic characteristics. NPCA requested that the proposed rule: (1) require SITLA to take all feasible action to protect trust lands with "unique scenic, archaeological, and paleontological sites" or other noneconomic values and provide for disposition alternatives that will protect those values while realizing fair economic value to the school trust, including at a minimum all trust lands within National and State Parks, National Monuments, National Wildlife Refuges, and river corridors nominated for Wild and Scenic River status; (2) require SITLA, in consultation with the Governor, to take all feasible steps to have the state or federal government acquire the lands for protection by purchase or exchange, at fair appraised value; and (3) when appraising lands for conservation transactions, take into account all values accruing to the State of Utah or the public schools generally accruing from recreation, tourism and educational values of protecting the lands, and ecosystem services attributable to retention and preservation of the land. NPCA Petition, ¶¶ 1, 2, 4, 5. SITLA denied the Petition for Rulemaking on October 5, 2006, and NPCA appealed. The Board

subsequently consolidated NPCA's appeal of SITLA's decision in the Supreme Court remand with the rulemaking appeal.

The basis for SITLA's denial of the rulemaking petition was that the non-economic values described in the *NPCA* decision could be protected without a rule that would limit SITLA's discretionary authority to manage trust lands in the most effective manner possible for the benefit of the trust beneficiaries. SITLA also noted the Board's decision in a prior adjudication to the effect that such a rule would unduly hamper the agency's ability to administer trust lands in a manner "most favorable to the beneficiaries" as required by *Utah Code Ann.* § 53C-1-302(b)(iv).

The Board notes that many issues of concern to the conservation community concerning trust lands at the time of the *NPCA* decision have been resolved in accordance with the Supreme Court's directive that trust values and economic values be reconciled where possible. For example, all state trust lands located within National Parks, National Monuments, and National Recreation Areas have been exchanged to the United States. Similar land exchanges have removed or are proposed to remove trust lands from proposed wilderness areas, endangered species habitat, and scenic river corridors. State laws with respect to archaeological and paleontological resources on trust lands – of specific concern to the *NPCA* court – have been significantly strengthened.

The Board is not convinced at this time that rulemaking – particularly as restrictive as that proposed by NPCA – is necessary or desirable to reconcile the interests of the trust beneficiaries and the interests of conservation. Nonetheless, in its policymaking capacity, the Board intends during the current fiscal year to study policy issues presented by the rulemaking petition and related issues with respect to public

interests in trust lands. SITLA's Motion to Dismiss NPCA's rulemaking petition will be taken under advisement pending such study. The Board reserves the right to request that the parties submit additional briefing or argument during this period.

Because the Board finds that the issues presented by Petitioners' appeal of the agency's approval of the land exchange valuation on remand are separate from the policy issue associated with the rulemaking petition, and because the exchange appeal may be resolved as a matter of law, the Board has determined that the two appeals should be separated. The Board's order with respect to the exchange valuation appeal will constitute a final order of the Board in that matter. The rulemaking appeal will be retained within the jurisdiction of the Board, and decided separately.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to conduct these formal adjudicative proceedings pursuant to *Utah Code Ann.* § 53C-1-304(2).

2. In Petitioners' appeal of SITLA's approval of land exchange values for State Exchange No. 188 on remand from the Utah Supreme Court, the Board concludes:

a. Petitioners' claims that SITLA's approval was wrongful because Garfield County received inadequate compensation are beyond the scope of the Supreme Court's remand and beyond the jurisdiction of the Board to determine.

b. Petitioners' claims that the McConkie Appraisal, as a Restricted Use Appraisal, was legally inadequate to satisfy the Supreme Court's mandate on remand are incorrect. The Board concludes that a Restricted Use Appraisal that complies with the Appraisal Foundation's Uniform Standards for Professional Appraisal Practice with respect to such appraisals was legally sufficient to permit SITLA to ascertain that the

exchange values satisfied the State's trust responsibilities, as directed by the Supreme Court.

c. Neither SITLA nor the Board are obligated as a matter of law to consider Petitioners' factual disputes with the McConkie appraisal with respect to issues such as highest and best use, utility access, restrictions on use imposed by the National Park Service, etc., because Petitioners lack standing to challenge specific valuation issues.

d. Petitioners' claims that SITLA's approval of the exchange values on remand violated applicable law or the directives contained in the *NPCA* opinion are incorrect. Petitioners' claims that the value approval should have considered the unique properties of Section 16 are barred by res judicata.

3. Because Petitioners' have failed, based upon the undisputed facts, to state a claim that SITLA's approval of land exchange values for State Exchange No. 188 on remand from the Utah Supreme Court was unlawful, Petitioner's appeal of such approval must be dismissed.

ORDER

1. Petitioners' appeal of SITLA's approval of land exchange values for State Exchange No. 188 on remand from the Utah Supreme Court is denied.

2. NPCA's appeal of SITLA's denial of its September 18, 2006 Petition for Rulemaking is separated from Petitioners' appeal of land exchange values. The rulemaking appeal is retained under advisement by the Board, subject to further deliberation by the Board with respect to Board policy.


NOTICE OF RIGHT TO REQUEST FOR RECONSIDERATION OR JUDICIAL

REVIEW

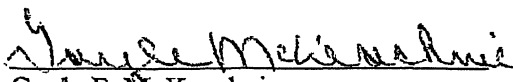
Any party affected by a final order or decision by the Board may file a petition for reconsideration and modification of an existing order within 20 days after the date the Order was issued by complying with Utah Admin Code R. 850-8-1700.

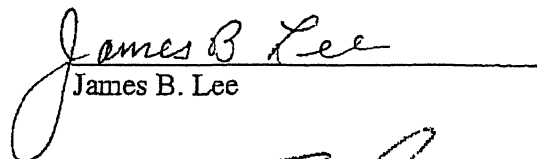
Any party may request judicial review of this Order by complying with the requirements of Utah Admin. Code R850-8-1300(3)(a) and (b), and R850-8-1900, which require a party seeking judicial review to: (1) file a petition for judicial review of a final order issued by the Board within 30 days after the date the order is issued or considered issued; (2) name the School and Institutional Trust Lands Administration and all other appropriate parties as respondents; and (3) file a petition for review of the Order with the appropriate court in the manner required by Utah Code Ann. §63-46-b-15 or §63-46b-16, as appropriate. IN THE EVENT A PETITION IS NOT FILED WITHIN THE 30 DAY TIME PERIOD, THIS ORDER WILL BECOME FINAL AND UNAPPEALABLE..


SO ORDERED BY THE BOARD THIS 13th day of September, 2007.

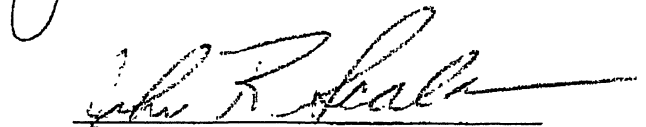

Michael P. Morris, Chair

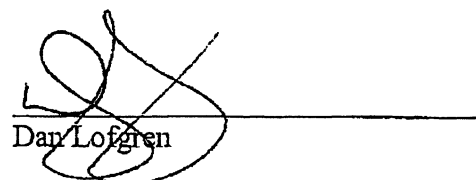

John F. Ferry, Vice Chair


Gayle F. McKeachnie


James B. Lee


Michael Brown


John R. Scales


Dan Lofgren

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2007, a true and correct copy of the foregoing FINAL ORDER: (1) SEPARATING ADJUDICATIVE PROCEEDINGS; AND (2) GRANTING STATE'S MOTION TO DISMISS APPEAL OF AGENCY ACTION RE EXCHANGE NO. 188 was sent to the following:

TO:

VIA:

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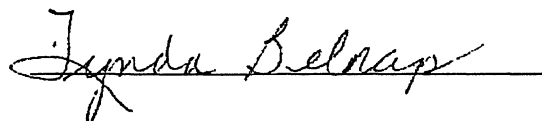
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ADDENDUM

2

LAW OFFICES OF
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December 12, 2006

Thomas A. Mitchell
Senior Attorney
School and Institutional Trust Lands Administration
State of Utah
675 East 500 South, Suite 500
Salt Lake City, UT 84102-2818

Re: Appeals Regarding Exchange 188 and Rule Making
Request;
Proposed Issues of Fact and Law

Dear Tom:

Please find enclosed NPCA's and Wolverton's statement of issues of fact and law. As you will see, there are various issues of fact for which we believe discovery is necessary or for which an evidentiary hearing may be required. For example the Morley & McConkie, L.C. "appraisal" is irreconcilably contradictory. (Regarding Section 16: "This parcel consists of land that is very irregular in terrain with steep sandstone cliffs and rocky terrain as well as some limited open space." Appraisal at p.3 "Parcel Three, located in the Capitol Reef National Park, has limited utility, if any." Appraisal, p.6. The analysis then suggests selling Section 16 in 40-acre parcels, which would suggest 16 such parcels for the entire section. Appraisal, p 13. The appraisal does not reconcile the "limited open space," p.3, and the location of 16 40-acre parcels with the described development.)

The Appraisal Review by Phillip Cook and Virginia Hylton, indicates some errors in the Morley & McConkie appraisal. We don't consider the appellants are limited in their analysis or criticism of the Morley & McConkie appraisal to comments in the Appraisal Review. We are considering witnesses who would testify regarding the character of the property, other appraisers or experts, and examination of Mr. McConkie.

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Thomas A. Mitchell
Senior Attorney
Page Two
December 12, 2006

When you have had an opportunity to review the accompanying statement, please call so that we might arrange times to discuss a stipulated statement.

Very truly yours,

MOYLE & DRAPER, P.C.

A handwritten signature in cursive script, reading "Wayne G. Petty".

Wayne G. Petty

WGP\cb
Enclosure
cc: William J. Lockhart

BEFORE THE BOARD OF TRUSTEES
SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION
[SITLA]

APPEAL FROM FINAL AGENCY ACTION
BY THE SITLA DIRECTOR DATED 15 SEPTEMBER 2006 IN RE EXCHANGE 188

PRELIMINARY STATEMENT ON BEHALF OF THE NATIONAL PARKS
CONSERVATION ASSOCIATION AND WILLIAM WOLVERTON REGARDING ISSUES
OF FACT AND LAW TO BE DETERMINED IN THE ABOVE MATTER

Pursuant to the JOINT STIPULATED SCHEDULING ORDER filed in the above matter,

A. appellants National Parks Conservation Association (“NPCA”) and William Wolverton submit the following preliminary statement of facts and issues presented by appellant’s appeal from the Director’s approval of an appraisal report regarding values of properties involved in Exchange 188 as sufficient to permit completion of that land exchange in fulfillment of SITLA’s obligations under the order of the Utah Supreme Court in National Parks & Conservation Association v. Board of State Lands, 869 P.2d 909 (1992) (“NPCA case.”), and

B. appellants National Parks Conservation Association (NPCA) submits the following preliminary statement of facts and issues presented by appellant’s appeal from the Director’s October 5, 2006 denial of NPCA’s PETITION FOR A RULE CHANGE dated 18 January 2006 [Hereafter, “rulemaking petition.”]

Appellants understand that, following this submission and a similar preliminary submission of facts and issues by counsel for SITLA, the parties will review the respective submissions for the purpose of submitting a joint statement of issues of both fact and law on which there is agreement between the parties, and on which there is disagreement, by 16 January 2007.

APPEAL REGARDING EXCHANGE 188

I. ISSUES OF FACT

A. Background facts pertinent to issues in the NPCA case that are relevant to the parties’ rights and duties in disposition of the lands at issue in Exchange 188, including facts regarding:

1. NPCA’s previous requests for declaratory rulings, actions by the Director and Board of State Lands, and judicial determinations, as established by the Utah Supreme Court in the NPCA case.
2. Any steps taken by SITLA to comply with the order and opinion of the Court in the NPCA

case prior to the arrangements it made to obtain the “Limited Restricted Use Report” by Morley & McConkie [hereafter, “McConkie Report”] on which it relied for appraisal compliance and in support of its 15 September 2006 final agency action on Exchange 188.

3. Actions taken by Garfield County in April 2006 to excavate fill material from approximately one-half acre of land in Section 16 for use in road work on the Burr Trail, constituting a direct violation of the stay of action in Section 16 entered by the Utah Supreme Court in the NPCA case.

4. Any knowledge by SITLA or its responsible employees or officers regarding any actions by Garfield County that could reasonable be understood to constitute a violation of the stay of the Exchange 188 transaction entered by the Court in the NPCA case.

5. Any steps taken by SITLA to seek remedies for or otherwise address any actions by Garfield County that could reasonable be understood to constitute a violation of the stay of the Exchange 188 transaction entered by the Court in the NPCA case.

6. Any steps taken by SITLA to comply with or fulfill the objectives of the guidance provided by the Supreme Court in the NPCA case to the following effect:

The Division should recognize that some school lands have unique scenic, paleontological, and archeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values. It may be possible for the Division to protect and preserve those values without diminishing the economic value of the land. For example, with appropriate restrictions it may be possible for livestock grazing and perhaps even mineral extraction to occur on a school section without damaging archaeological and paleontological sites. But when economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.

[869 P.2d 921]

B. Facts relevant to determination of the “standing” of NPCA and of William Wolverton, including facts regarding:

1. NPCA’s role and continuing activities, on behalf of its members, seeking to protect Utah national parks, specifically including Capitol Reef National Park, from land ownership or development activities that may conflict with the natural, scenic, aesthetic and recreational values for whose protection these parks are reserved.

2. NPCA's role and continuing activities and specific administrative steps and litigation efforts, on behalf of its members, taken to prevent development or road improvement activities on the Burr Trail, specifically including the road and adjacent areas in Section 16 and including its activities and litigation in the NPCA case challenging Exchange 188.

3. Use and enjoyment of the natural, scenic, aesthetic and recreational values of Capitol Reef National Park, specifically including areas within Section 16, by NPCA members including William Wolverton.

4. The interest and activities of NPCA and William Wolverton in taking action to ensure that the national park values they seek to protect, as described above, are not degraded as a result of unlawful activities. uses or occupancy on lands within Capitol Reef National Park.

C. Facts relevant to the understanding and acceptance by SITLA and Garfield County of the value of lands purported to be exchanged in Exchange 188, including facts regarding:

1. Garfield County's understanding and acceptance of the fact that the properties it would convey to SITLA in Exchange 188 were valued at a total of \$661,000, based on the McConkie Report dated 25 August 2005.

2. Whether Garfield County determined or claimed that it received or would receive any compensation for conveyance of its lands in Exchange 188 other than or in addition to SITLA's conveyance to the County of Section 16, Township 34, Range 8 East.

3. SITLA's understanding and acceptance of the fact that the properties it would convey to Garfield County in Exchange 188 were valued at a total of \$200,000, based on the McConkie Report dated 25 August 2005.

4. Whether SITLA determined or claimed that Garfield County received or would receive any compensation for conveyance of the County lands in Exchange 188 other than or in addition to SITLA's conveyance to the County of Section 16, Township 34, Range 8 East.

5. Whether any other facts are pertinent to determining the lawfulness of the County's action in conveying land valued at \$661,000 in exchange for acquiring land valued at \$200,000, or to determining the validity of SITLA's action in approving those values for completion of Exchange 188.

D. Facts pertinent to the lawfulness and adequacy of the "Limited Restricted Use Report" prepared by Morely and McConkie, L.C. for use as an independent and accurate appraisal of the values of the lands involved in Exchange 188 and for satisfaction of the requirement for an independent appraisal as ordered by the Utah Supreme Court in the NPCA case, including facts regarding:

1. All limitations or restrictions on the content and analysis of the McConkie report, and all “allowable departures” from the Uniform Standards of Professional Appraisal Practices, as recited in the McConkie Report, or otherwise adopted or utilized in rendering the McConkie Report for use by SITLA in connection with Exchange 188.
2. All terms and conditions urged or required by SITLA or by Morley & McConkie applicable to the latter firm’s preparation of the McConkie Report on which SITLA relied for compliance with the opinion and order of the Court in the NPCA case and in support of its 15 September 2006 final agency action on Exchange 188.
3. Any other oral or written understandings by or between SITLA and/or by Morley & McConkie and/or Garfield County regarding limitations on or allowable departures from the Uniform Standards of Professional Appraisal Practice, or regarding valuation expectations, which could have influenced the valuations reported in the Limited Restricted Use Report.
4. Any communications from or by SITLA or its predecessor agency advising Garfield County that the value of properties it must offer to effectuate Exchange 188 must be increased to some approximate or designated value over and above the value of properties initially proffered by the County for Exchange 188.
5. Any communications between Garfield County and SITLA or its predecessor agency regarding the reason for or purpose of Garfield County’s interest in the exchange by which it could acquire Section 16.
6. The steepness of the terrain within Section 16, and the extent of land and building sites within Section 16 with slopes at low enough gradient to permit feasible and lawful access and construction.
7. Whether Morley & McConkie, in preparing the McConkie Report, or SITLA in approving it, determined that despite the steepness of the Section 16 terrain, all or identified portions of the 640 acres of Section 16 were sufficiently feasible for development or use as to be susceptible of sale in 40-acre lots as the basis for the values specified in the Report – and if so, the factual and analytical basis for that determination.
8. Whether Morley & McConkie, in preparing the McConkie Report, or SITLA in approving it, made any determination regarding the effect on land values in Section 16 resulting from the steepness of the terrain or the absence of water and utilities, and if so, the content of and factual and analytical basis for that determination.
9. Whether Morley & McConkie, in preparing the McConkie Report, or SITLA in approving it, made any inquiries, investigations or determinations regarding applicable regulatory restrictions governing construction on and use of the land within Section 16 that would or could result from exercise of regulatory authority over the land by the National Park Service in compliance with

the National Park Service Organic Act and other regulatory protections for the natural, scenic, aesthetic and recreational use of land within Capitol Reef National Park. And whether either Morley & McConkie or SITLA made any determination regarding the effect on land values in Section 16 that would or could result from such regulatory restrictions; and if so, the content and analytical basis for that determination.

10. In considering and ultimately approving the McConkie Report and the values specified therein as satisfying the appraisal requirements imposed by the NPCA case, whether SITLA made any inquiries or investigation, gave any consideration, or made any determinations regarding the factors inquired about in paragraphs 5-9 above, or their effect on the adequacy of the appraisal and values for Exchange 188. If so, the content of any such inquiries or investigation, and the content and factual basis for any such determination.

E. Facts regarding any consideration by SITLA of means to protect the natural, scenic, aesthetic or recreational values of Section 16 while returning fair value to the school trust

1. Whether, after the decision of the Utah Supreme Court in the NPCA case, SITLA considered or reviewed the possibility of conveying Section 16 to the National Park Service or another entity that would provide protection of the natural, scenic, aesthetic and recreational values of that Section in return for fair value compensation to the school trust?

2. If SITLA did consider the possibility discussed in paragraph 1, what arrangements for that purpose did SITLA consider, what decision was made, and what were the factual and legal grounds for that decision?

3. If SITLA did not consider the possibility discussed in paragraph 1, was a specific decision made not to consider it, and what were the factual and legal grounds for that decision?

4. In considering, or failing or declining to consider a fair value conveyance to an entity that could provide protection of Section 16's natural, scenic, aesthetic and recreational values, did SITLA give any consideration to the effect on the value of the section to the school fund that may result from regulatory restrictions on the use of Section 16 attributable to its presence within a national park? If so, what factors were considered; and if not, why not?

5. Whether, after the decision of the Utah Supreme Court in the NPCA case, SITLA considered and/or carried out any steps that would or were intended to provide protection of the natural, scenic, aesthetic and recreational values of Section 16. If so, what steps were taken; and if not, why not.

6. Whether SITLA has adopted or applied any policies or practices for the purpose of protecting any kind of noneconomic values on any lands held subject to school trust obligations. If so what lands were or are involved, what policies or practices were adopted, and what if any legal

protections were or are applicable to those lands other than or in addition to SITLA's policies or practices?

7. In determining whether to approve the McConkie Report as the basis for the values involved in Exchange 188, did SITLA have any legal authority to reject or cancel that exchange and enter into a transaction for conveyance of Section 16, at fair value, to the National Park Service or other purchaser committed to protecting the natural, scenic, aesthetic and recreational values on that section?

II. ISSUES OF LAW

A. With regard to the background facts and legal considerations arising from the NPCA case:

1. Whether under the remand for a new appraisal ordered by the Supreme Court in the NPCA case, or under any other legal requirement, SITLA was legally required by its earlier transaction with Garfield County to complete Exchange 188 despite the unlawfulness of the appraisal on which the exchange was first based.
2. After the Supreme Court invalidated the lawfulness of the first appraisal, did SITLA or its predecessor thereafter have lawful authority to seek invalidation of the conveyance to Garfield County and approve a different transaction by which Section 16 could be conveyed for fair value to the National Park Service or another entity with a commitment to protect the natural, scenic, aesthetic and recreational values of that section.
3. Whether a violation by Garfield County of the terms of the stay entered by the Supreme Court in the NPCA case could legally affect any obligation SITLA might have had to remain bound by its earlier decision to convey Section 16 to Garfield County?
4. Whether, in determining the future disposition of Section 16, SITLA had any legal obligation to consider or explain its judgment regarding the factors and possible steps for protection of the noneconomic values of that Section discussed by the Utah Supreme Court in the NPCA case?

B. Whether NPCA and William Wolverton have standing to appeal the SITLA agency action approving the Morley and McConkie "Limited Restricted Use Appraisal Report" as the basis for completing Exchange 188.

1. Based on the standing of NPCA and standing concepts established in the NPCA case.
2. Based on application of the concepts and analysis of the Utah Supreme Court in Utah Chapter of the Sierra Club, et al v. Utah Air Quality Board, et al, ___ P.2d ___, 2006 UT 73 (Utah Supreme Court No. 20050454, Nov. 21, 2006).

C. Lawfulness of the compensation received by Garfield County under Exchange 188, and the effect of unlawful compensation on the validity of action by SITLA to approve the Exchange or to enter into an alternative transaction protecting Section 16

1. Do the values approved for Exchange 188 in the Morley & McConkie Report, as approved by SITLA, render unlawful the conveyances by Garfield County in Exchange 188 because the County will receive inadequate compensation for the lands it conveys in the Exchange? And is Garfield County thereby barred from completing, or required to reverse or renegotiate the transaction?
2. If the transaction by Garfield County is unlawful because of inadequate compensation to the County, can SITLA lawfully participate in and claim the benefits of that inadequate compensation by approving and completing the exchange transaction on the basis of the values in the McConkie Report? Or does the unlawfulness of the transaction bar SITLA from completing it on those terms?
3. Does SITLA's claimed legal obligation to maximize financial return to the school trust authorize it to participate in and benefit from transactions otherwise unlawful under state or federal law?
4. If Exchange 188 cannot lawfully be completed on the basis of the values in the McConkie Report, is SITLA then legally free to negotiate a different disposition of Section 16?
5. If Exchange 188 cannot lawfully be completed on the basis of the values in the McConkie Report, could SITLA then lawfully conclude a transaction for fair value conveying the Section to the National Park Service or another entity committed to protecting the natural, scenic, aesthetic and recreational values of that Section, including if SITLA receives full value for the Section?
6. If SITLA is legally free to negotiate a protective disposition of Section 16, does the Supreme Court's decision in the NPCA case require it to give consideration to the factors that support such a disposition, including :
 - (a) SITLA's authority to approve such a transaction, as reflected in any comparable practice of modifying use or disposition of trust lands for protection of archeological sites or to comply with other regulatory or policy goals ;
 - (b) the limitations on value of Section 16 likely to arise from the regulatory restrictions that will constrain the economic value of any development within Capitol Reef National Park, and the continuing costs involved in disputing or litigating such regulatory constraints;
 - (c) the limitations on value of the section arising from its precipitous terrain;
 - (d) the limitations on value of the section arising from the unavailability of utility service and water;
 - (e) the tourist value to the state of a public policy of protecting national parks by preserving nearby properties rather than subjecting them to incompatible development;
 - (f) the greater feasibility of negotiating a fair value transaction with a solvent protective

entity at the reduced value likely to result from the various factors inadequately considered by the Morley & McConkie Report, including:

- * the restrictions and “allowable departures” from proper appraisal practice as acknowledged in that Report;
- * the steepness of the terrain and resulting diminished development value;
- * the unavailability of access to utilities and water.

D. The legal adequacy of the McConkie Report to support Exchange 188 – specifically, whether the various inadequacies of the Report in failing to consider factors important to valuation render the Report inadequate as an appraisal that can satisfy the Supreme Court’s mandate in the NPCA case.

APPEAL REGARDING PETITION FOR A RULE CHANGE

I. ISSUES OF FACT

A. Facts regarding NPCA filing of its January 18, 2006 PETITION FOR A RULE CHANGE, the Director’s October 5, 2006 letter of denial (with attachments), and NPCA’s October 18, 2006 Appeal from that denial.

B. Facts regarding the factors considered by the Director in denying NPCA’s rulemaking petition:

1. Whether the Director considered any facts, or made any inquiries or studies about the management constraints or limitations of use that may be applicable to state trust lands held within national parks or the other management units for which this rule was proposed by NPCA.
2. Specifically, whether the Director made any inquiries, studies or determination regarding uses and activities on state trust lands that may be prohibited or regulated within such management units, and how such prohibitions or regulations may limit or diminish remunerative use, lease, exchange or sale of such trust lands.
3. Specifically, whether the Director made any inquiries, studies or determinations regarding the effect of such prohibitions or regulations on the fair or appraisal value of state school trust lands held within national parks or the other management units for which this rule was proposed by NPCA.
4. Whether the Director’s response to NPCA’s rulemaking petition misunderstood or otherwise erroneously responded on the mistaken premise that NPCA seeks a rule that would give preference to protection of noneconomic values over return to the trust in managing school trust lands held within national parks or the other management units for which this rule was proposed by NPCA. Specifically, whether the Director understood that NPCA’s rulemaking petition would provide occasion to consider whether better advantage to the school fund could come from

a protective disposition of the sort proposed in the rule than from retention of properties subject to often-rigorous regulatory restrictions on activities and uses.

5. Whether the Director sought or obtained any legal advice regarding the extent of regulatory authority that may be exercised for the protection of noneconomic values within national parks and the other management units for which the rules was proposed.

C. Incorporation of pertinent fact issues from NPCA's Preliminary Statement Regarding Issues of Fact and Law to be determined in the pending APPEAL FROM FINAL AGENCY ACTION BY THE SITLA DIRECTOR DATED 15 SEPTEMBER 2006 IN RE EXCHANGE 188.

Certain aspects of the NPCA/Wolverton appeal from the Director's action approving the McConkie Report as the basis for Exchange 188 are highly pertinent in illustrating facts and considerations which NPCA contends should be taken into account by SITLA in its decision regarding NPCA's rulemaking petition. Thus, the fact issues listed in this section duplicate, and are numbered in brackets] to conform to the parallel Preliminary Statement of Facts filed with respect to NPCA'S appeal on Exchange 188. They include facts regarding the following

[Paragraph A, Issue 6]

Any steps taken by SITLA to comply with or fulfill the objectives of the guidance provided by the Supreme Court in the NPCA case to the following effect:

The Division should recognize that some school lands have unique scenic, paleontological, and archeological values that would have little economic value on the open market. In some cases, it would be unconscionable not to preserve and protect those values. It may be possible for the Division to protect and preserve those values without diminishing the economic value of the land. For example, with appropriate restrictions it may be possible for livestock grazing and perhaps even mineral extraction to occur on a school section without damaging archaeological and paleontological sites. But when economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.

[869 P.2d 921]

[Paragraph B]. Facts relevant to determination of the "standing" of NPCA and of William Wolverton, including facts regarding: – {All listed issues.}

[Paragraph D, Issue 9]

Whether Morley & McConkie, in preparing the McConkie Report, or SITLA in approving it, made any inquiries, investigations or determinations regarding applicable regulatory restrictions

governing construction on and use of the land within Section 16 that would or could result from exercise of regulatory authority over the land by the National Park Service in compliance with the National Park Service Organic Act and other regulatory protections for the natural, scenic, aesthetic and recreational use of land within Capitol Reef National Park. And whether either Morley & McConkie or SITLA made any determination regarding the effect on land values in Section 16 that would or could result from such regulatory restrictions; and if so, the content and analytical basis for that determination.

[Paragraph E:]

Facts regarding any consideration by SITLA of means to protect the natural, scenic, aesthetic or recreational values of Section 16 while returning fair value to the school trust – All listed issues, as follows:

1. Whether, after the decision of the Utah Supreme Court in the NPCA case, SITLA considered or reviewed the possibility of conveying Section 16 to the National Park Service or another entity that would provide protection of the natural, scenic, aesthetic and recreational values of that Section in return for fair value compensation to the school trust?
2. If SITLA did consider the possibility discussed in paragraph 1, what arrangements for that purpose did SITLA consider, what decision was made, and what were the factual and legal grounds for that decision?
3. If SITLA did not consider the possibility discussed in paragraph 1, was a specific decision made not to consider it, and what were the factual and legal grounds for that decision?
4. In considering, or failing or declining to consider a fair value conveyance to an entity that could provide protection of Section 16's natural, scenic, aesthetic and recreational values, did SITLA give any consideration to the effect on the value of the section to the school fund that may result from regulatory restrictions on the use of Section 16 attributable to its presence within a national park? If so, what factors were considered; and if not, why not?
5. Whether, after the decision of the Utah Supreme Court in the NPCA case, SITLA considered and/or carried out any steps that would or were intended to provide protection of the natural, scenic, aesthetic and recreational values of Section 16. If so, what steps were taken; and if not, why not.
6. Whether SITLA has adopted or applied any policies or practices for the purpose of protecting any kind of noneconomic values on any lands held subject to school trust obligations. If so what lands were or are involved, what policies or practices were adopted, and what if any legal protections were or are applicable to those lands other than or in addition to SIMLA's policies or practices?
7. In determining whether to approve the McConkie Report as the basis for the values involved in

Exchange 188, did SITLA have any legal authority to reject or cancel that exchange and enter into a transaction for conveyance of Section 16 , at fair value, to the National Park Service or other purchaser committed to protecting the natural, scenic, aesthetic and recreational values on that section?

II. QUESTIONS OF LAW

A. Pertinent to SITLA's legal authority to adopt a rule of the kind and for the purpose proposed by NPCA:

1. Whether the Director properly held that exercise of authority to adopt a rule of the kind and for the purpose proposed by NPCA would be incompatible with SITLA's obligations to the school trust, or would impermissibly "limit the full discretionary authority of the Agency to "manage, maintain, or dispose" of trust assets.
2. Whether SITLA or the Director actually possesses "full discretionary authority" to "manage, maintain, or dispose" of trust assets where those assets are comprised of lands held within various state and national management units whose designated managers are empowered with regulatory authority committed to protect noneconomic values on those lands.
3. In what way would the consideration of fair value exchanges for the purpose and as proposed by NPCA (or with permissible amendments) contradict or defeat SITLA's obligation to manage trust lands for the benefit of the school trust? If there is a rule that so rigidly forbids such consideration, has SITLA undertaken to adopt that rule through the rulemaking process as required by the Utah Rulemaking Act at sec. 63-46a-3(g)?
4. Whether, and the extent to which, the regulatory authority available to managers of national parks or other protective management units may lawfully be exercised to prohibit or restrict activities or uses of state school trust lands within those units in a manner that may significantly reduce the value of those uses or of the affected trust lands.
5. Whether, in considering a petition for rulemaking, SITLA's authority to consider the proposed rule is confined to the exact text of the rule as proposed, or whether SITLA may respond to the proposal with a modified version designed to address problems perceived in the original proposal?
6. Whether the rule as proposed by NPCA was so far beyond SITLA's authority that SITLA was barred by rulemaking procedure, including Administrative Rule R15-2-5, from acting on the rule proposal by developing a modified rule more compatible with its authority and obligations.
7. Was the Director correct in concluding that the SUWA case, on which he relies in his decision on NPCA's rulemaking petition, bars SIMLA from taking any actions based on considerations involving protection of noneconomic values?

7. In the SUWA case, relied on by the Director in his decision on NPCA's rulemaking petition, the Board repeatedly emphasized that even under its present management practices, development prospects for school trust lands are often qualified by steps to comply with other regulatory requirements. (SUWA case, Order at 21.) What, if any, legal basis is there for concluding that SITLA has similar authority to take steps for adoption of a rule that would facilitate fair value dispositions of land as a means of avoiding the management conflicts associated with lands held within national parks or the other management units for which this rule was proposed by NPCA?